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No. _____

In The

Supreme Court of the United States

October Term, 1993

PACIFIC NORTHWEST VENISON PRODUCERS, a Washington corporation; ROBERT V. BAKER; JAMES E. RICH; D. BRUCE MORGAN; and WASHINGTON ALTERNATIVE LIVESTOCK ASSOCIATION, a Washington corporation,

Petitioners,

v.

CURT SMITCH, Director of Washington Department of Wildlife; DEAN A. LYDIG, JAMES M. WALTON, MITCH JOHNSON, TERRY KARRO, JOHN McGLENN, NORMAN F. RICHARDSON, Commissioners of the Washington State Wildlife Commission; and the WASHINGTON STATE DEPARTMENT OF WILDLIFE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL M. SEBY
WILLIAM PERRY PENDLEY*
*Counsel of Record
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
(303) 861-0244

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ISSUES PRESENTED

1. Whether a State, merely by raising a concern for its native wildlife, may halt the interstate and foreign transportation of articles of interstate and foreign commerce?

2. Whether the State of Washington may excessively burden interstate and foreign commerce by ignoring the availability of less discriminatory alternatives?

3. Whether a federal court can make credibility determinations of expert testimony on a motion for summary judgment?

LIST OF PARTIES

The caption contains the names of all parties to this petition.

TABLE OF CONTENTS

Page

DECISIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH SUPREME COURT PRECEDENT REGARDING THE LEVEL OF SCRUTINY TO BE APPLIED TO STATE LAWS THAT OVERTLY DISCRIMINATE AGAINST INTERSTATE COMMERCE 10

II. THE NINTH CIRCUIT'S DECISION IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE OTHER CIRCUIT COURTS' APPLICATION OF THIS COURT'S COMMERCE CLAUSE DECISIONS 14

III. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH SUPREME COURT COMMERCE CLAUSE DECISIONS 20

IV. THE VALIDITY OF STATE AGRICULTURAL TRANSPORTATION BANS IS A MATTER OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT 25

V. THE NINTH CIRCUIT'S RULE OF JUDICIAL ADMINISTRATION CREATES PERNICIOUS EFFECT THAT CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority, 906 F.2d 516 (11th Cir. 1990) 18

Anderson v. Liberty Lobby, Inc., 477 U.S 242 (1986) 29

Bibb v. Navajo Freight Lines, 359 U.S 520 (1959) 17

C.A. Carbone, Inc., et al. v. Town of Clarkston, New York, 62 U.S.L.W. 4315 (May 6, 1994) 25

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 22

Chemical Waste Management, Inc. v. Hunt, 1121 S.Ct. 2009 (1992) 25

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 14, 25

Crutcher v. Kentucky, 141 U.S. 47 (1891) 11

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. ___, 125 L.Ed.2d 469 (1993) 24

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 13

Dennis v. Higgins, 498 U.S. 439 (1991) 10

Dorrance v. McCarthy, 957 F.2d 761 (10th Cir. 1992) 16, 17, 23

Granfinanciera, S.A. v. Nordberg, 492 U.S 33 (1989) 29

H.P. Hood and Sons v. Dumond, 336 U.S 525 (1949) 10

Healy v. Beer Institute, 491 U.S. 324 (1989) 17

Hughes v. Oklahoma, 441 U.S. 322 (1979) .. 11, 12, 19, 21

Hunt v. Washington Apple Advertising Comm'n, 434 U.S. 333 (1977) 12, 13

Huron Cement Co. v. Detroit, 362 U.S 440 (1960) 15

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 28

TABLE OF AUTHORITIES – Continued

Page

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 23

Maine v. Taylor, 477 U.S. 131 (1986) ...12, 13, 19, 21, 22

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 20, 21

Mistretta v. United States, 488 U.S. 361 (1988) 28

Palermo v. United States, 360 U.S. 343 (1959) 28

Parklane Hosiery v. Shore, 439 U.S. 322 (1979) 29

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).... *passim*

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978) 17, 23

Shapiro v. Thompson, 394 U.S. 618 (1969)..... 12

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 28

Sugarman v. Dougall, 413 U.S. 634 (1973) 11

United States v. Diebold, Inc., 369 U.S 654 (1962) 29

Wood Marine Service, Inc. v. City of Harahan, 858 F.2d 1061 (5th Cir. 1988)..... 18

CONSTITUTION

Article I, Section 8, Clause 3.....2, 10

STATUTES AND REGULATIONS

16 U.S.C. § 1531, *et seq*..... 3

28 U.S.C. § 1254(1) 2

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1331 2

42 U.S.C. § 1983 11

RCW 16.36.020 (1987) 8

W.A.C. § 232-12-017(7) 8

OTHER AUTHORITY

F.R.A.P. 10.1(c) 9, 10

F.R.C.P. 56 27

Bell, D., *The Supreme Court 1984 Term. Forward: The Civil Rights Chronicles*, 99 Harv. L. Rev. 4 (1985) 12

The Federalist No. 42 (Madison) 30

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 20 F.3d 3042 (9th Cir. 1994), and is reproduced in the Appendix beginning at p. 1. Page references are to the version in the Appendix.

The memorandum decision and order of the United States District Court, Western District of Washington, Case No. 92-1076WD, is also reproduced in the Appendix beginning at p. 24.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on April 1, 1994, and was filed the same day. No petition for rehearing was sought. In accordance with Supreme Court Rule 13, this petition for certiorari is timely filed. This case involves a constitutional challenge to certain provisions of the State of Washington Administrative Code. As such, the federal courts have jurisdiction pursuant to 28 U.S.C. § 1331. This petition is being filed in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, provides, in pertinent part:

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several states, . . .

The Washington Administrative Code provisions at issue are set out in the Appendix beginning at p. 40.

STATEMENT OF THE CASE

This petition involves a challenge to the constitutionality of certain provisions of the Washington Administrative Code which ban the importation, possession, propagation, sale, or transfer of several mammal species.

A. Procedural History

Petitioners are, or represent, ranchers and farmers who commercially raise some of the affected animals. Petitioners filed this action in the United States District Court for the Western District of Washington, seeking declaratory relief, an injunction barring enforcement of the regulations, and damages from individual Respondents. Petitioners argued that the regulations are unconstitutional in that they take property without just compensation, deny Petitioners due process of law and equal protection, and violate the Commerce Clause. Petitioners also contended that the regulations conflicted, in part, with the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.* (1973).

Specifically, in regard to the Commerce Clause claim, Petitioners maintained that the regulations impermissibly burden foreign and interstate commerce in the most direct manner possible: blocking all interstate and foreign transportation at the State of Washington's border. Petitioners further maintained that the regulations place an excessive burden on interstate and foreign commerce when considered in light of the local interests they purportedly serve and whether such interests could be promoted by alternatives having a less restrictive impact on interstate and foreign commerce.

On July 15, 1992, the district court denied Petitioners' Motion for a Preliminary Injunction, except to enjoin, temporarily, the enforcement of the propagation ban as to Petitioner Morgan's sika deer (*Cervus nippon keramae*), a federally-listed endangered species. Oral argument was

heard on August 10, 1992, on all parties' motions for summary judgment. Pending a ruling on the summary judgment motions, the court, on August 11, 1992, temporarily enjoined enforcement of the propagation ban as to all species and enforcement of the ban on importation of animals from British Columbia solely for slaughter. These orders were conditioned upon continued compliance with all applicable health inspection and safe-confinement requirements.

On September 2, 1992, Petitioners' Motion for Summary Judgment was granted as to the procedural due process claim, and the individual Respondents were enjoined from enforcing the June 19, 1992, regulations insofar as they prohibited Petitioners from propagating their animals. In all other respects, the district court denied Petitioners' Motion for Summary Judgment and granted Respondents' Motion for Summary Judgment.

The Petitioners appealed the district court's determination of the Commerce Clause claims to the United States Court of Appeals for the Ninth Circuit. Petitioners submitted that the dismissal of their claims should have been reversed because the district court's ruling was inconsistent with the standards governing a motion for summary judgment which require that all factual inferences be drawn in the light most favorable to the party opposing the motion. Similarly, Petitioners contended that the district court failed to follow applicable law in analyzing the violations of the Commerce Clause at issue here. The Ninth Circuit Court of Appeals affirmed the district court's decision in upholding the constitutionality of the regulations, despite the regulations' discriminatory treatment of interstate and foreign commerce and despite the availability of less discriminatory alternatives. Ignoring this Court's prior precedential decisions, the Ninth Circuit incorrectly concluded that there was insufficient evidence of the regulations' impact on commerce and that

the evidence regarding the effectiveness of less discriminatory alternatives was not credible.

B. The Case

In the early 1980's, many ranchers, farmers, and others in Washington State began looking into alternatives to traditional livestock, *e.g.*, cattle, certain species of sheep, goats, and pigs. Some conservationists, such as Petitioner D. Bruce Morgan, have been involved in breeding species in an effort to save them from extinction or to enhance the genetic pool of the species. Some, like Petitioner Jim Rich, took up deer farming, in which fallow and/or sika deer are farmed for venison. Others had captive elk and mouflon sheep.

Petitioner, the Pacific Northwest Venison Producers (the "Co-op"), is a Washington corporation which acts as an agricultural cooperative in the slaughtering and marketing of deer for venison. Petitioners banded together in an effort to better develop opportunities to participate in a growing national market for alternative livestock. The Co-op has approximately 22 members, 68% of which are located in British Columbia, Canada, 23% in Washington State, and 9% in Oregon. Among other activities, the Co-op transports deer from Canadian producers in containers sealed by the United States Department of Agriculture ("USDA") to a USDA inspected and certified slaughterhouse in Burlington, Washington. There, the animals from Canada, Washington and Oregon are processed according to all applicable federal health and safety regulations.

In 1993, there were approximately 55,813 deer being raised commercially on 291 farms in the United States. Today, the economic value of the commercial deer farm industry in the U.S. is about $110,000,000 in animals (farm gate value) and another $54,800,000 in facilities, excluding land. In the lower 48 states, game-ranched and

farm-raised venison production totalled 110 tons in 1990 (25 tons from farm-raised stock) which reflects an increase of 177% per annum since 1983.

Understandably, the demand for game meats is reflected in increased sales. Multiproduct meat wholesalers that vend venison have experienced increased sales of 15-500% since 1984. Venison has become the predominant import meat of every exotic/game meat wholesaler. These businesses believe that the game meat industry will double or triple its current size in the next five years. Petitioners have equal confidence in the potential of the market.

Under existing Washington law, the State Veterinarian, Dr. Robert Mead, is charged with safeguarding the health and safety of livestock in Washington, and thereby indirectly safeguarding human health. Dr. Mead testified that no animals, whether traditional or alternative livestock, were imported without his permission. He required testing for diseases and parasites, depending upon the species and depending upon the location from which the animals were to be imported.

The deer farmers, in particular, worked closely with the state and federal departments of agriculture with respect to animal health issues. The deer farmers' desire to keep their animals disease and parasite free is not rooted merely in altruism: it is also rooted in economics. Alternative livestockmen invest substantial amounts in their animals, farms and ranches. An outbreak of disease can devastate the herd, as well as the farmer.

In late 1990, the Washington State Departments of Agriculture and Wildlife began a series of discussions regarding regulation of this industry. Five drafts of a "memorandum of understanding" were negotiated between Dr. Mead and Rolf Johnson of the Department of Wildlife. The memorandum of understanding would have established regulatory responsibilities between the two

departments and provided for inter-departmental cooperation on game farming issues of mutual interest. The fifth draft was expected to be the final draft. Instead of signing it in 1992, the Department of Wildlife created a "task force" to look into the "commercialization of wildlife," much to the surprise of the State Veterinarian and the state Department of Agriculture.

At this point, various alternative livestockmen learned of the task force, and sought to provide information about their animals and industry. They wrote letters and made telephone calls, repeatedly asking the Wildlife Department and the Wildlife Commission for the opportunity to meet with and provide information to department staff and to the Commission. Respondents repeatedly refused the offers by Petitioners and others to meet, confer, exchange information and ideas, and testify in public hearings.

Respondents scheduled a Wildlife Commission "workshop" for June 17, 1992. At such workshops, the public could attend, but could not speak, testify, cross-examine or present any other statements. On June 12, 1992, a week in advance of the "workshop," Respondents drafted and printed, but did not release, a press release stating, among other things, that an emergency existed. The press release announced the adoption of emergency regulations banning the importation, possession, sale, and breeding of certain non-native animals, such as fallow and sika deer.

A few days prior to the June 17 workshop, the Wildlife Department hired Dr. Briggs Hall, a veterinarian with no wildlife experience. Subsequently, at the June 17 workshop, the Commissioners were presented a series of carefully selected presentations. These presentations were not under oath, and therefore, were not testimony. To their credit, the presenters made no pretense of trying to be even-handed or impartial in their presentations.

Although the State Veterinarian is charged by statute[1] to protect the health of animals in Washington State and was present at the June 17 workshop, he was not allowed to speak. Having already made up their minds before the meeting, Respondents did not ask the State Veterinarian any questions, nor did they ask him to make any oral or written presentation.

Thus, the Respondents' improper process and purpose resulted in the promulgation of emergency regulations which forbid:

- importing;
- holding or possessing;
- propagating;
- offering for sale, selling, or transferring; or
- releasing

certain species proclaimed to be "deleterious" by the hastily adopted regulations. The following species owned by Petitioners were summarily declared to be "deleterious": (1) *Keramae sika;* (2) elk; (3) fallow deer;[2] and (4) mouflon sheep. Respondents' alleged reasons for their precipitous actions include: (1) the danger of transmission of diseases and parasites; (2) the possibility of hybridization and contamination of the gene pool of native wildlife; and (3) the feared superior competition by escaped "deleterious" species, displacing native wildlife and/or damaging habitat.

Ironically, Respondents claim the danger is so great that immediate action was warranted, yet:

- Many of the species named "deleterious" (and at issue in this action) have been in the

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[1] RCW 16.36.020 (1987).

[2] Respondents have promulgated permanent regulations which are essentially the same as the emergency regulations; however, they do not prohibit commerce in fallow deer, W.A.C. § 232-12-017(7). Appendix at p. 68.

State of Washington for decades with no discernible problems with disease, parasites, hybridization or competition with native wildlife.

- Washington has been free of tuberculosis for a decade.
- Washington is free from brucellosis.
- Washington is free of the meningeal worm.
- Washington's elk population is not genetically pure, probably because the Wildlife Department deliberately introduced and released a different sub-species of *Cervis elaphus* in an effort to "improve" the gene pool.

Bovine tuberculosis, brucellosis and the meningeal worm have been animal health concerns for decades, in some cases since the Nineteenth Century. The past century has seen the movement of tremendous numbers of animals from the east to the west, with virtually no controls or restrictions for health, safety, and the population ecology of the areas into which the animals were introduced. Despite this free movement of animals, Washington is still free of the meningeal worm, brucellosis, and bovine tuberculosis.

This is not to say that there should be no restrictions, nor have Petitioners ever contended that no efforts should be made to maintain the health and safety of Washington's livestock and wildlife. The Washington State Veterinarian already requires testing and, in some cases, refuses to allow importation. Responsible regulations, balancing the restrictions on commerce with legitimate scientific concerns, are needed. Other governments such as Colorado, Idaho, and British Columbia have done so.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(a) lists among the considerations governing review on *certiorari*, the circumstance

when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter. Under Rule 10.1(c), grounds for review also exist when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. All of these grounds for review are present in this case.

I. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH SUPREME COURT PRECEDENT REGARDING THE LEVEL OF SCRUTINY TO BE APPLIED TO STATE LAWS THAT OVERTLY DISCRIMINATE AGAINST INTERSTATE COMMERCE.

The Commerce Clause, Art. I, Sec. 8, Clause 3 of the United States Constitution, authorizes Congress "to regulate commerce . . . among the several states." The Founding Fathers envisioned a national economic entity and this Court has given life to that vision. *See H.P. Hood and Sons v. Dumond*, 336 U.S. 525 (1949).

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsmen shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Dennis v. Higgins, 498 U.S. 439, 449-50 (1991) (quoting *H.P. Hood & Sons, Inc., supra*, 539). Our economic system

depends upon the free flow of commerce among the states.

In more recent times states have not been excluded entirely from the power to regulate interstate commerce.

> States may regulate interstate commerce even-handedly to effectuate a local public interest, and . . . [the] effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it would be promoted as well with a lesser impact on interstate activities.

Hughes v. Oklahoma, 441 U.S. 322, 331 (1979), citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

However, the limited power of individual states to regulate in the area of interstate commerce in no way diminishes the importance of the national economy. So important is economic growth and a citizen's ability to participate in the economy that the right to engage in interstate commerce is considered a "privilege" guaranteed to every citizen by the United States Constitution. *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891); *Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist dissenting). Further, this Court recently held that the Commerce Clause confers "rights, privileges and immunities" which may be asserted and vindicated under 42 U.S.C. § 1983. *Dennis v. Higgins, supra.* Thus, because Washington's ban on the foreign and interstate transportation of Petitioners' animals interferes with Petitioners' fundamental right to engage in interstate commerce, strict scrutiny should be applied to this legislation which infringes upon Petitioners' fundamental rights.

In the beginning of this nation's history, the crucial legal questions concerned economic, and not personal freedom. Even the resolution of the debate over the propriety of slavery was resolved by means of an economic analysis. *See*, D. Bell, *The Supreme Court 1984 Term. Forward: The Civil Rights Chronicles*, 99 Harv. L. Rev. 4, 6 (1985). The key to economic freedom and the key to the strength of the country in the Nineteenth Century was the free flow of interstate commerce.

The free flow of commerce is still crucial to our country's strength. The right to engage in the free flow of interstate commerce is not dissimilar to the right of an individual to travel freely in interstate commerce which this Court has deemed to be a fundamental right. *Shapiro v. Thompson*, 394 U.S. 618, 629-630 (1969). That right cannot be the subject of discriminatory state legislation unless the state can show that the legislation is necessary to promote a compelling governmental interest. *Id.* at 634. While *Shapiro* speaks in terms of equal protection analysis, discrimination against the right to engage in interstate commerce is similar, and the same type of scrutiny should apply to protect Petitioners in this case.

Legislation impinging upon fundamental interests or affecting suspect classes, arising in the context of equal protection analysis, interstate commerce clause analysis, or privileges and immunities analysis, is subject to the highest scrutiny. It is this highest scrutiny, or strict scrutiny, which the Ninth Circuit did not apply, that Petitioners are asking the Court to apply in this case so that their fundamental right to participate in the national economy will be protected.

The strict scrutiny analysis in commerce clause cases, involving discriminatory statutes, has often been applied by this Court. *See Maine v. Taylor*, 477 U.S. 131 (1986); *Hughes v. Oklahoma*, 441 U.S. 332 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977). Once

discrimination against interstate commerce is established, "at a minimum" the Court must apply "the strict scrutiny of any purported legitimate local purpose and the absence of nondiscriminatory alternatives." *Id.* at 337.

Under such an analysis, the most compelling of evidence is required to sustain the statute. It is not enough for the Court to find that the legislation is simply one reasonable or plausible means to promote a legitimate state objective. Rather, under the mandated intensive review, the Court must look beyond the enunciated statutory purpose and consider, even speculate, as to the availability of less burdensome alternatives. *See, Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).[3] Although the lower courts in this case upheld the regulations, a review of those decisions does not reveal the critical analysis of the Respondents' evidence which would be required under a strict scrutiny standard. The Ninth Circuit held that Respondents' ban on importation of Petitioners' animals did "not make these regulations discriminatory." Appendix at p. 10. Further, the Ninth Circuit held that "[b]ecause the considerations that would weigh in favor of a heightened scrutiny are absent, we apply the test for evenhanded regulations with incidental burdens on interstate and foreign commerce." Appendix at p. 11. Because

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[3] As Justice Stewart has stated:

> A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no restraints on state action other than those laid down by the Due Process Clause, save for the rare instance when a state artlessly discloses an avowed purpose to discriminate against interstate goods.

Maine v. Taylor, supra at 152 (Stewart, J. dissenting) quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

the Ninth Circuit failed to apply strict scrutiny to Washington's transportation ban, this Court should grant review to underscore the proper commerce clause analysis as mandated by prior decisions of this Court.

II. THE NINTH CIRCUIT'S DECISION IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE OTHER CIRCUIT COURTS' APPLICATION OF THIS COURT'S COMMERCE CLAUSE DECISIONS.

Because the Washington Department of Wildlife regulations are clearly protectionist regulations which directly burden interstate commerce, it is unnecessary to engage in the balancing that is more appropriate for laws whose effect on interstate commerce is only incidental. Nevertheless, even if the regulations are considered under that standard, they still do not pass constitutional muster.

Divergent views as to the Commerce Clause implications of an outright ban on articles moving in interstate commerce has led to a division in the appellate courts over the criteria by which such laws should be judged – whether they have merely an incidental effect on interstate commerce and are thus subject to the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), or whether they fall in the category of protectionist restrictions on commerce itself, where a burden on interstate commerce can be justified only if the law advances legitimate local purposes that cannot be met by nondiscriminatory means. *See City of Philadelphia v. New Jersey*, 437 U.S. at 624.

The standard to be applied in balancing cases was summarized by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[4]

Even if the Washington regulations could somehow be regarded as an even-handed, non-protectionist effort to advance a legitimate local interest – which they do not – the burden on interstate commerce is clearly "excessive in relation to the putative local benefits" and "could be promoted as well with a lesser impact on interstate activities."[5] Thus, the regulations run afoul of the Commerce

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[4] The statute before the Court in *Pike* was a discriminatory measure requiring that Arizona-grown cantaloupe be packed in the state. Although *Pike* is commonly cited for its expression of the balancing standard, quoted above, the Court actually employed the *per se* standard in striking down the statute. *See* 397 U.S. at 145.

[5] Regarding the putative state interest, the Ninth Circuit stated that "PNVP has failed to offer evidence that could legally support an inference that the Department was not actually concerned about the health of Washington's wildlife." Appendix at p. 13. The Ninth Circuit's assertion, however, ignores the fact that the legitimacy of a state purpose is necessarily a factual matter. Petitioners did, contrary to the Ninth Circuit's statement, present legally sufficient evidence which correctly called into question the legitimacy of the Respondents' motives in invoking efforts to protect the state's wildlife. The Ninth Circuit

Clause even under the more liberal balancing test applicable to laws whose burdens on interstate commerce are only incidental.

Two federal courts of appeals have had occasion to address the issue of the constitutionality of state regulations banning the interstate transportation of certain game animals. One of these courts – the Tenth Circuit – has concluded that it was inappropriate for a district court to grant summary judgment because of the existence of material issues of fact regarding the validity of the purported state interest in placing such an extreme burden on interstate commerce. *Dorrance v. McCarthy*, 957 F.2d 761, 765 (10th Cir. 1992). Most importantly, the Tenth Circuit held that the district court failed to consider the

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ignored Petitioners' evidence regarding the district court's holding that the Respondents violated Petitioners' procedural due process rights in promulgating the emergency regulations. The district court expressly stated that there was no such emergency which excused Respondents' biased decisionmaking process. Appendix at p. 34. Further, the Ninth Circuit ignored the fact that Dr. Briggs Hall, the Department of Wildlife veterinarian, was forced to recant major portions of his testimony in the district court the day after the summary judgment hearing. The remainder of Dr. Hall's testimony was severely discredited or proven false by Dr. Mead and Dr. Dix. Appendix at pp. 100-103. Petitioners similarly presented evidence supporting an improper motive in that thousands of other animals who have equal or greater susceptibility for Respondents' stated concerns are allowed to be freely transported through Washington, with little or no testing. Similarly, Petitioners have subsequently become aware that sovereign Indian nations within Washington can freely import these animals under the jurisdiction of the Washington Department of Agriculture which classifies them as "livestock" subject to the available testing procedures Dr. Mead discussed in his deposition. Appendix at pp. 100-102.

availability of the same less burdensome alternatives as those present in this case. *Id.*[6]

Dorrance presents a direct conflict with the Ninth Circuit's decision in this case. The Ninth Circuit began its analysis by correctly noting that "certain types of impacts on interstate commerce are of special importance in the balance with the state's putative interest." Appendix at 17. However, the Ninth Circuit then proceeded to ignore Petitioners' substantial evidence regarding the regulations' significant disruption of interstate and foreign commerce. Appendix *id.*

Petitioners presented clear and substantial evidence discussing the national and foreign market for its animals and their processed products. Similarly, Petitioners illustrated that these animals and their products frequently move in interstate and foreign commerce as a function of market supply and demand for breeding stock and slaughter facilities, as well as the organizational nature of Petitioner PNVP which has producers in two states and one Canadian province. Regarding Petitioners' evidence, the Ninth Circuit ignored what this Court has set forth as relevant economic impacts on interstate commerce which are of special importance in the *Pike* analysis, to be balanced against the state's putative interest. *See Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 445 (1978); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526-27 (1959) (disruption of travel and shipping due to lack of uniformity in state laws); and *Healy v. Beer Institute*, 491 U.S. 324, 337 (1989) (impacts on commerce that extend beyond the borders of the defendant state).

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[6] The Tenth Circuit, in reaching its decision, was compelled to follow this Court's precedent flowing from the *Pike* analysis. *Dorrance* at 765.

The split which now exists between the Ninth and Tenth Circuits also appears in the decisions of other federal appellate courts regarding the proper elements to be applied under the *Pike* balancing test. For instance, in *Wood Marine Service, Inc. v. City of Harahan*, 858 F.2d 1061 (5th Cir. 1988), a zoning ordinance, although found to be even-handed and non-discriminatory, was nonetheless analyzed to see whether there was an excessive burden placed on commerce. The Fifth Circuit concluded there was no excessive burden on commerce because "there is no evidence that less . . . materials will be shipped into Louisiana." 858 F.2d at 1061. Similarly, in *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516 (11th Cir. 1990), a statute limited all rental car firms to a single van at airports. The Eleventh Circuit, believing this statute was clearly non-discriminatory and even-handed, nonetheless analyzed it for excessiveness. As a part of its review, the Eleventh Circuit determined that "Alamo has not proffered a plan to reduce curbside snarls which is less burdensome on 'interstate activities.' " 906 F.2d at 522.

These divergent results cannot be explained solely by variations in the particular statutory or regulatory scheme b ing considered. Rather, the decisions reveal fundamental differences in the analytical framework within which the Commerce Clause analysis is conducted. The Ninth Circuit stated that it was applying the *Pike* test, but stripped to its essence, what the Ninth Circuit did was construct a circular argument which reads "burden" out of the test, and confined the test solely to the question of discrimination. The Ninth Circuit conceded that a non-discriminatory regulation is unconstitutional if it is excessively burdensome, but then evaded the factual issue of whether the regulation is excessively burdensome by holding that the regulation cannot be burdensome if it is non-discriminatory. Such a

formulation of the *Pike* analysis would make the Commerce Clause inapplicable to any regulation that burdened interstate commerce, but is non-discriminatory, and also would make irrelevant any consideration of the extent of the burden in relation to the putative local purpose where the burden was simply incidental.

The Ninth Circuit's analysis is incorrect. Washington's regulations are discriminatory, given the fact that these regulations cut off all commerce at the state's border.[7] Such laws have been held by this Court to be the hallmark of a discriminatory enactment. *See Maine v. Taylor*, 477 U.S. 131, 137 (1986); *Hughes v. Oklahoma*, 441 U.S. 322 (1979). However, even if Washington's regulations were non-discriminatory, the law requires that any burdens imposed on commerce are still subject to the commerce clause, and the constitutional requirement is that such burdens not be excessive. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Ninth Circuit's opinion significantly deviates from this Court's decisions and *certiorari* is warranted to correct the Ninth Circuit's divergence.

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[7] Respondents explicitly acknowledged this fact in the district court when the court inquired as to what Petitioners' British Columbia members could do when wishing to sell their animals within the Petitioners' Cooperative.

> THE COURT: How would they get them to Oregon?
> COUNSEL: Well, they could transport them circuitously around the State of Washington, Your Honor. I'm not suggesting this is necessarily economically practical, but there are alternatives.

Transcript of Proceedings, August 10, 1992, Petitioners' Supplemental Excerpts of the Record at 23.

III. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH SUPREME COURT COMMERCE CLAUSE DECISIONS.

The Ninth Circuit's decision is directly contrary to this Court's precedent which expressly holds that non-discriminatory statutes can be an unlawful burden on interstate commerce even if the burdens they impose are "even-handed." In addition, the Ninth Circuit decision conflicts with this Court's holding that an analysis, as to the extent of the burden and the availability of other alternatives, must be performed even where there is no discrimination. Specifically, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), a case which the Ninth Circuit suggests controls this case, this Court first discussed the standard to be applied to statutes which discriminate against interstate commerce, either in purpose or in practical effect. This Court then held:

> Even if a statute regulates "evenhandedly," and imposes only "incidental" burdens on interstate commerce, the courts must *nevertheless* strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). Moreover, "the *extent of the burden* that will be tolerated will of course depend on the nature of the interest involved, and *on whether it could be promoted as well with a lesser impact on interstate activities.*

449 U.S. at 471 (emphasis added).

In *Clover Leaf*, the Court had before it a Minnesota statute which banned the sale of milk packaged in plastic containers, but which permitted milk to be sold in cartons and bottles. The Court determined that the statute did not discriminate as between interstate and intrastate commerce, but was "even-handed." 449 U.S. 472. According

to the Ninth Circuit's formulation of the Commerce Clause test, the *Clover Leaf* Court should have ended the inquiry at this point, but it did not. Instead, the Court went on to analyze, based on a record developed by a trial on the merits, whether or not the burden placed on interstate commerce was "clearly excessive." It is crucial to note that the Ninth Circuit erroneously invoked the rationale and analysis of *Clover Leaf, supra,* to validate a transportation ban which entirely prohibits the USDA regulated, private transportation of certain animals, no matter how they may be packaged.

Clover Leaf is the law of the land. It has not been overruled and the approach it dictates continues to be the approach taken by this Court. This approach requires a weighing and a balancing of local interests and burdens on commerce, even where the burdens imposed by legislation are non-discriminatory.

The question of whether Washington's regulations are "clearly excessive in relation to the putative local benefits" is "one of degree" requiring the balancing approach under *Pike*. However, contrary to the Ninth Circuit's assertions, the *Pike* approach requires an evidentiary consideration of the factual contentions of the parties. This is precisely the approach this Court has followed in the leading commerce clause cases; typically deciding them on a full record with deference to findings made below by triers of fact. Thus, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), *Maine v. Taylor*, 477 U.S. 131 (1985), and *Hughes v. Oklahoma*, 441 U.S. 332 (1979), this Court did its weighing and balancing only after the lower court had held a trial on the merits and heard all the evidence.

First and foremost, there is the question of the extent of the burden on commerce. Although the Ninth Circuit concluded that the burden was irrelevant, it did so on the basis of inferences drawn against Petitioners and in the face of a substantial record of evidence to the contrary.

Appendix at p. 18. On a motion for summary judgment, a court may not draw such inferences. Indeed, the courts below are obligated to draw the inferences in Petitioners' favor and assume that Washington's import and ownership bans put the maximum burden on interstate commerce. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Respondents asserted that there was a disagreement among experts as to the availability of satisfactory alternatives and that this is enough to defeat the showing required of Petitioners, citing *Maine v. Taylor*, 477 U.S. 131 (1986). This assertion is inappropriate on a motion for summary judgment and factually wrong in this case. First, Petitioners presented an overwhelming amount of uncontroverted evidence regarding available alternatives. Appendix at pp. 100-103. Second, the Court's ruling in *Maine* was made only after hearings in which experts were subject to cross-examination, and the development of a full-evidentiary record. *See* 477 U.S. at 140; *cf.*, *id.* at 143, n.15. No such hearings were ever conducted in this case. Third, in *Maine* the statute's challenger conceded there were no scientific tests for disease. In this case, Petitioners' experts testified that there are scientifically-recognized tests which are, in fact, being utilized by Washington for imports of other animals.[8] Furthermore, these tests are being effectively used in other states. As the Court said in *Maine*, a state "no longer may be able to justify its import ban" once scientifically-acceptable sampling and inspection procedures are available. 477 U.S. at 147.[9]

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[8] *See*, Appendix at pp. 100-103.

[9] As this Court has observed, "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to

Despite the fact that the record below clearly reflects Petitioners' extensive and substantive alternatives, offered by experts who are leaders in their respective fields of animal science, and despite the fact that the Respondents gave absolutely no consideration to any alternative other than a total ban, the Ninth Circuit called Petitioners' evidence "tenuous" and "inconclusive," saying "[w]e doubt that these expert opinions as to the efficacy of PNVP's proposed alternatives could support a factual finding in PNVP's favor." Appendix at p. 20. However, these are the same available and less burdensome alternatives which the Tenth Circuit found to be legally sufficient. *See Dorrance v. McCarthy*, 957 F.2d 76 (10th Cir. 1992).

If Respondents wish to rely on their interest in ecological preservation, they must show that interest, and the infeasibility of other alternatives, with far greater specificity than that which convinced the courts below. The Ninth Circuit stated, "[w]hen the evidence as to the efficacy of proposed alternatives is as disputed and inconclusive as it is in this case, it would simply be inappropriate for a court to substitute its judgment for that of [Respondents] in deciding which expert testimony to credit." Appendix at p. 21. However, as this Court has explained:

> a key question to be answered in determining whether a theory or technique is scientific knowledge . . . will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from

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be invalid under the Commerce Clause." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality opinion) (*citing Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978)).

> other fields of human inquiry." . . . "[T]he statements constituting a scientific explanation must be capable of empirical test."

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. ___, 125 L.Ed.2d 469, 482-83 (1993) (citations omitted). " 'Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement.' " *Daubert* at 481 (quoting *amici curiae* brief of the American Association for the Advancement of Science and the National Academy of Sciences (emphasis in original)).

Petitioners were never afforded the opportunity to substantiate the validity of their evidence, or to defend its veracity through cross-examination. Rather, the Ninth Circuit merely rejected Petitioners' evidence *in toto* and accepted the Respondents' unfounded assertions of environmental catastrophe.

Similarly, this Court has noted that

> [t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.
>
> * * *
>
> The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, *and that in itself is an advance.*

Daubert at 484-85 (emphasis added).

Thus, Petitioners' substantial evidence should not have been so easily discredited in the face of the Respondents' mere supposition of environmental harm. Despite the Tenth Circuit's prior review and acceptance of the same credible evidence, the Ninth Circuit gave what amounts to a special dispensation from this Court's mandated Commerce Clause analysis. The Ninth Circuit's

opinion significantly deviates from this Court's decisions and *certiorari* is warranted to correct the Ninth Circuit's divergence.

IV. THE VALIDITY OF STATE AGRICULTURAL TRANSPORTATION BANS IS A MATTER OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT.

In recent years, an increasing number of states have adopted animal transportation laws, such as the ones at issue here, which impose an outright ban on the interstate transportation and movement of certain game species raised for human use and consumption.

Unlike the laws considered by this Court in *C.A. Carbone, Inc., et al. v. Town of Clarkston, New York*, 62 U.S.L.W. 4315 (May 6, 1994); *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009 (1992); and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which sought to prohibit or burden the importation of waste into a state or municipality, animal transportation bans seek to prohibit the commercial ventures of certain entrepreneurial activities which have been ongoing for years. As explained, *infra*, at Parts I and III, these laws have begun to spawn extensive Commerce Clause litigation in the federal courts, with those courts reaching divergent results.

The problem that has led to protectionist legislation against game farming in this case, and in other states that have similar bans, is the mirror image of the "not-in-my-back-yard" syndrome that led to the earliest discriminatory enactments against legitimate articles of commerce.

The political attraction of game animal transportation bans is apparent. By forcing the extinguishment of any private ownership of game animals for meat production and propagation, Washington is preserving a monopolistic source of a product and resource now much in demand – processed venison meat. Additionally, hunting

is a very substantial business in Washington, in that hunters come from other states to purchase hunting licenses, hunting opportunities and guiding services in Washington. State revenues generated by hunting are significant: hunting dollars contribute greatly to the economies of the whole state and the communities where they hunt. The effect of these regulations is to protect Washington hunting from venison production. In shifting market costs, however, the transportation bans impose a burden on those citizens engaged in the interstate raising of deer for venison. Similarly, a significant amount of tourism centers around Washington's wildlife resource. Thus, a state's actions which purportedly favor native wildlife are protectionist regulations given the state's vested financial interest in that resource.

Moreover, the Ninth Circuit found that animals imported under federal USDA quarantine and jurisdiction for slaughter posed the same degree of threat as those used for breeding stock. Appendix at 21. The Ninth Circuit also found that the State had the absolute right to usurp federal authority and force animals moving under federal seal to be transported around the State of Washington. The denial of access to animal processing facilities in Washington under USDA jurisdiction was also upheld. *Id.* A powerful tool has now become available to any state for use against many species of domesticated animals. A state's simple allegation of a threat to native wildlife is now legally sufficient to stop the shipment of animals being transported under federal quarantine to federally supervised facilities for slaughter. This kind of balkanization, in which states seek to advance their own interests by erecting impermissible barriers to the free movement of animals certified by the United States Department of Agriculture ("USDA"), is precisely what the Commerce Clause was intended to prevent. *See* pp. 14-19, *infra.*

Finally, the constitutionality of state animal transportation bans is of obvious importance to the states that

have enacted, or are considering the enactment of, such laws. If, as Petitioners contend, such state actions violate the Commerce Clause, these state governments need to know this now, so that their agriculture and wildlife management decisions can be made on a fully informed basis.[10] On the other hand, if such bans are found not to violate the Commerce Clause, then the states will benefit from a decision by this Court that dispels the existing cloud of patchwork state regulation that has and will continue to result in the disarray of the lower courts as discussed in Part II of this petition.

V. THE NINTH CIRCUIT'S RULE OF JUDICIAL ADMINISTRATION CREATES PERNICIOUS EFFECTS THAT CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Not only does the Ninth Circuit's ruling conflict with the Constitution, with prior decisions of this Court, and with the decisions of other circuits, it establishes a policy which is the antithesis of the clear, simple and fair summary judgment provision adopted by Congress in Federal Rule of Civil Procedure 56. Indeed, the Ninth Circuit has manufactured a "rule of judicial administration" that has virulent consequences for all sides.

The Ninth Circuit has refused to recognize that its power to weigh the credibility of expert testimony at the summary judgment stage has been displaced by enactment of the Federal Rules of Civil Procedure. That refusal

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[10] For much the same reason, individuals who are seeking to diversify and enter a growing national market need to know if their significant capital expenditures and often-times dedication of all the assets of their family farms will not be in vain. Such was the case with Petitioners who worked for seven years, in tandem with Respondents, in researching and receiving consultative advice as to how to properly set-up their game farms.

and the Ninth Circuit's disregard for Petitioners' significant and substantial evidence regarding effective, less burdensome alternatives reveals a fundamental lack of respect for the limits of inherent judicial power and it effects substantive revisions of rights granted Petitioners under this Court's prior decisions. *See*, Parts II and III, *infra*. Such disrespect presents an important opportunity for this Court to underscore to the lower federal courts basic axioms regarding the limits of judicial power.

The power of the federal courts – including even this Court – "to proscribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959). Congress possesses the authority under the Necessary and Proper Clause "to enact laws carrying into execution the powers vested in other departments of the Federal Government," *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n.7 (1979), including an "undoubted power to regulate the practice and procedure of federal courts." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941).

Yet, this message has been lost on the Ninth Circuit. Despite the instruction of both Congress and this Court, the Ninth Circuit has chosen to advance its own concerns about the credibility of expert witness testimony by brazenly enacting what must be viewed as a judicial amendment to the Federal Rules of Civil Procedure. The Ninth Circuit's attempt to function as a "sort of junior-varsity Congress," *Mistretta v. United States*, 488 U.S. 361, 427 (1988) (Scalia, J. dissenting), should be overturned. Our system of justice entrusts such practical grounds for skepticism of a witness' testimony to the jury – not to judges – and the Seventh Amendment bars the strange rule imposed by the Ninth Circuit.[11]

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[11] This Court has previously held that "credibility determinations, the weighing of evidence, and the drawing of legiti-

The Ninth Circuit is profoundly mistaken in its holding that a state's mere supposition of environmental catastrophe is sufficient to carry the state's heavy burden of demonstrating that its regulations in this instance survive constitutional scrutiny as required by this Court's prior Commerce Clause decisions. The Ninth Circuit's bizarre dismissal of Petitioners' expert testimony is bad law and bad science, has no place in federal jurisprudence, and merits prompt review.

CONCLUSION

Washington's transportation ban falls squarely within the prohibitions of the Commerce Clause. Although animal transportation bans were unknown to the generation that framed and ratified the Constitution, the supporters of the Constitution well understood the incentives for political subdivisions to impose such burdens on commerce and the ingenuity with which they would attempt to do so:

> A very material object of the [Commerce Clause] was the relief of the States which import and export through other States from the improper

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mate inferences from the facts are jury functions, not those of the judge," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962), and by displacing these jury functions the decision below violates the Seventh Amendment.

The Seventh Amendment's history makes clear that its central mission is to check the power of autocratic, life-tenured federal judges by entrusting factual disputes to empaneled jurors who are independent of the sovereign's judges, however inefficient this can be at times. *See Parklane Hosiery v. Shore*, 439 U.S. 322, 337-56 (1979) (Rehnquist, J. dissenting); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 83 (1989) (White J. dissenting) ("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge").

> contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience that such a practice would be introduced by future contrivances. . . .

The Federalist No. 42 (Madison).

Washington's interstate and foreign animal transportation ban is just such a "contrivance," and should be struck down.

Respectfully submitted,

PAUL M. SEBY
WILLIAM PERRY PENDLEY*
*Counsel of Record
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
(303) 861-0244

Attorneys for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC NORTHWEST VENISON PRODUCERS, a Washington corporation; ROBERT V. BAKER; JAMES E. RICH; D. BRUCE MORGAN; WASHINGTON ALTERNATIVE LIVESTOCK ASSOCIATION, a Washington corporation, *Plaintiffs-Appellants,* v. CURT SMITCH, Director of Washington Department of Wildlife; DEAN A. LYDIG, JAMES M. WALTON, MITCH JOHNSON, TERRY KARRO, JOHN MCGLENN, NORMAN F. RICHARDSON, Commissioners of the WA State Wildlife Commission, WASHINGTON STATE DEPARTMENT OF WILDLIFE, *Defendants-Appellees.*	Nos. 92-36766 92-36953 D.C. No. CV-92-1076-WLD OPINION

On Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted
February 3, 1994 – Seattle, Washington

Filed April 1, 1994

Before: Thomas M. Reavley*, Otto R. Skopil, Jr., and Edward Leavy, Circuit Judges.

Opinion by Judge Skopil

SUMMARY

Natural Resources and Energy/Wildlife and Habitat/Environmental Law

The court of appeals affirmed a district court judgment. The court held that the Washington Department of Wildlife's regulations prohibiting the importation, possession, propagation, or transfer of certain "deleterious exotic wildlife" do not violate the Commerce Clause.

Appellees Washington Department of Wildlife promulgated regulations prohibiting the "importation, holding, possession, propagation, sale, transfer or release" of "deleterious exotic wildlife," including mouflon sheep. The Department later promulgated emergency regulations which added sika deer to its list of prohibited deleterious exotic wildlife. At the same time, the Department promulgated emergency regulations prohibiting the same activities regarding certain native wildlife species, including elk. The purported reason for the emergency regulations was to guard against perceived dangers to native wildlife.

Appellant Pacific Northwest Venison Producers (PNVP), an agricultural cooperative of commercial game

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* The Honorable Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

farms, sued appellee Director of the Department, challenging the regulations as applied to certain species. On summary judgment, the district court held that the regulations did not violate the Commerce Clause, substantive due process, or equal protection, but that the Department violated PNVP's procedural due process rights by failing to provide them with a hearing.

PNVP appealed the district court's judgment on the Commerce Clause ground only, contending that the regulations were discriminatory. PNVP also contended that it raised issues of material fact as to whether the state had legitimate interests that were addressed by the regulations, and whether the regulations' burden on interstate and foreign commerce was clearly excessive in relation to the state's interests. Finally, PNVP also contended that it raised material factual issues regarding available alternatives that would protect the state's interests as well as the regulations.

[1] An import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items. [2] The regulations at issue in this case clearly were not fueled by economic protectionism, nor did they result in the citizens of Washington receiving benefits that were denied to others. Thus, the ban on importation did not make the regulations discriminatory.

[3] PNVP failed to offer legally sufficient evidence from which a factfinder could infer that the state's putative interests to be served by the regulations were not its actual interests.

[4] Because PNVP offered no evidence that differing regulations in the various states created any particular difficulties for those who exported animals from other countries, [5] the burden on foreign commerce was analyzed in the same manner as the burden on interstate commerce.

[6] PNVP failed to show that it could produce any evidence that could support a holding that the regulations' impact on interstate and foreign commerce was clearly excessive in relation to an interest as important as the protection of native wildlife. Not only did PNVP fail to show that the regulations may have impacts of federal concern, it also failed to offer evidence that could support a finding of anything more than a minimal economic impact on interstate or foreign commerce.

[7] PNVP's evidence as to the efficacy of proposed alternatives to the regulations was too inconclusive to have a significant effect on the balance between the burdens on interstate commerce and the state's putative interests.

COUNSEL

Paul M. Seby, Mountain States Legal Foundation, Denver, Colorado, and Peter B. Camp, Stern, Camp & Von Kallenbach, Seattle, Washington, for the plaintiffs-appellants.

Robert K. Costello, Sr., Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

Ward Swanser, Moulton, Dellingham, Longo & Mather, Billings, Montana, for the amicus.

OPINION

SKOPIL, Circuit Judge:

Plaintiffs Pacific Northwest Venison Producers and several of its members (collectively, "PNVP") appeal the district court's summary judgment in favor of the Washington Department of Wildlife and the Washington State Wildlife Commission (collectively, "Department of Wildlife" or "Department"), upholding the constitutionality of the Department's regulations banning the private ownership and exchange of several species of wildlife. We affirm.

FACTS AND PRIOR PROCEEDINGS

In January 1991, the Department of Wildlife promulgated regulations that prohibit the "importation, holding, possession, propagation, sale, transfer or release" of "deleterious exotic wildlife," including mouflon sheep. *See* Wash. Admin. Code § 232-12-017(1)(d)(iv), -017(2). In June 1992, the Department promulgated emergency regulations which added fallow deer and sika deer to is list of prohibited deleterious exotic wildlife. Wash. St. Reg. 92-14-015 (amending Wash. Admin. Code § 232-12-017(d)(v)). At the same time, the Department promulgated emergency regulations that prohibit the same activities regarding certain native wildlife species, including elk. *Id.* at 92-14-014 (amending Wash. Admin. Code § 232-23-064(2)). The purported reason for the emergency regulations was to guard against perceived

dangers to native wildlife presented by captive herds of these animals.

Following the promulgation of the regulations, the Department invited several wildlife experts to speak at a workshop to determine whether these animals actually present risks to native wildlife. The Department invited only experts who had previously expressed concern about the risks that game farms pose to native wildlife. Neither experts who support game farms nor ranchers who raise the prohibited wildlife were allowed a hearing to present evidence to counter the concerns raised at this workshop.

The experts at the workshop identified several risks to native wildlife presented by game farms. First, the importation of any animals presents a risk of importing diseases such as tuberculosis and brucellosis. Animals carrying the disease can infect native wildlife either after escaping, or through fenceline transmission.

Second, importation of animals presents some risk of importing the parasitic meningeal worm. This parasite is fatal to all cervids except the white-tail deer, which acts as a carrier. Scientists have not conclusively established whether other cervids are able to carry and pass on the meningeal worm in low numbers that are difficult to detect. The meningeal worm has not yet been found west of the Great Plains, possibly because the drier interior of the continent is not amenable to its secondary hosts, snails and slugs. Some experts fear that if a white-tail deer were to pick up the meningeal worm from an animal imported from the East, the parasite could spread rapidly

within the white-tail deer population, and eventually decimate populations of other cervids.

Third, captive herds present the possibility that groups of animals might escape and become free-ranging herds, competing with native wildlife for forage and habitat. Finally, game farms present risks that escaped animals will breed with wild animals and affect the genepool of Washington's native wildlife.

PNVP, an agricultural cooperative of commercial game farms in Washington, Oregon, and British Columbia, filed this lawsuit shortly after the emergency regulations were promulgated, challenging the regulations as applied to elk, mouflon sheep, sika deer, and fallow deer. On summary judgment, the district court held that the regulations do not violate the Commerce Clause, substantive due process, or equal protection, but that the Department violated plaintiffs' procedural due process rights by failing to provide them with a hearing. The court also ruled that the federal Endangered Species Act preempted the state regulation banning the propagation of subspecies of sika deer that are federally listed endangered species. PNVP appeals the district court's judgment on the Commerce Clause ground only.

DISCUSSION

1. *Mootness*

The emergency regulations covering elk, sika deer, and fallow deer have expired since the district court filed its order, raising the possibility that this appeal has become moot as to these animals. The Department of Wildlife has now promulgated permanent regulations

which are essentially the same as the emergency regulations, however, *see* Wash. Admin. Code §§ 232-12-017(1)(d), -017(2), -064(2), except that they do not prohibit commerce in fallow deer, *id.* § 232-12-017(7), or federally listed endangered species, *id.* § 232-12-017(6). Therefore, this appeal is not moot as to the prohibitions of elk and sika deer. *See Bunker Ltd. Partnership v. United States*, 820 F.2d 308, 312 (9th Cir. 1987).

The Department's permanent regulations added a provision which allows commerce in fallow deer to continue. Wash. Admin. Code § 232-12-017(7). Although PNVP argues that the permanent regulations contain provisions that also impermissibly burden commerce, only the constitutionality of a total ban was addressed by the district court and by the parties on appeal. We therefore decline to address the constitutionality of the new regulation regarding fallow deer.

Since the regulations no longer ban fallow deer, this appeal is moot as to that species. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1335 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991). We thus address only the constitutionality of the regulations as applied to elk, mouflon sheep, and sika deer.

2. *Discriminatory Versus Evenhanded Regulations*

The United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . " U.S. Const. Art. I, § 8. Even in areas where Congress has not exercised this authority, state regulations may violate the Commerce

Clause either because the regulations discriminate against interstate or foreign commerce, or because they incidentally affect such commerce. If the regulations discriminate in favor of in-state interests, the state has the burden of establishing that a legitimate state interest unrelated to economic protectionism is served by the regulations that could not be served as well by less discriminatory alternatives. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986). In contrast, if the regulations apply evenhandedly to in-state and out-of-state interests, the party challenging the regulations must establish that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the putative local benefits. *See Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 525-26 (1989); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

PNVP contends that two provisions demonstrate that the Department of Wildlife regulations are discriminatory. The first is the inclusion of "importation" in the list of prohibited activities. Wash. Admin. Code §§ 232-12-017(2), -064(2). The second is the "grandfather clauses," which allow owners to keep animals already legally present within the state. *Id.* §§ 232-12-017(4)(b), -064(8).

a. *The Ban on Importation*

PNVP argues that any state prohibition of imports or exports is per se discriminatory. The Supreme Court has stated that "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. The clearest example of such

legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (internal citations omitted) (state may not ban importation of solid waste while allowing disposal of in-state waste).

[1] Relying on this language, the Tenth Circuit has held that state regulations banning the importation of certain wildlife species are per se discriminatory, regardless of the overall regulatory scheme. *Dorrance v. McCarthy*, 957 F.2d 761, 765 (10th Cir. 1992). We respectfully disagree. In practical effect, the importation ban adds nothing to the prohibitions that apply equally to in-state and out-of-state interests, because animals could not be imported if they are not allowed to be held, possessed, transferred, or sold once inside the state. An import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items. *See Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009, 2016-17 (1992) (discussing quarantine laws).

[2] The guiding principle in determining whether a state regulation discriminates against interstate or foreign commerce is whether either the purpose or the effect of the regulation is economic protectionism. *See Philadelphia*, 437 U.S. at 623-24. The regulations at issue here clearly are not fueled by economic protectionism, nor do they result in the citizens of Washington receiving benefits that are denied to others. The ban on importation thus does not make these regulations discriminatory.

b. *The Grandfather Clauses*

PNVP does not challenge the grandfather clauses in and of themselves; they are at issue only as far as they impact on our analysis of the overall regulatory scheme. These clauses allow Washington residents to continue to possess and sell animals that were legally held within the state prior to the passage of the regulations. Wash. Admin. Code §§ 232-12-017(4)(b), -064(8), Propagation of these animals, however, is prohibited. *Id.* §§ 232-12-017(4)(e)-(f), -064(8)(c), -064(8)(f).

Such exceptions may "weaken the presumption in favor of the validity of the general [prohibition], because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 447 (1978). In this case, however, plaintiffs include Washington residents who have introduced extensive evidence that the grandfather clauses do very little to protect their economic investments. Plaintiffs have actively pursued political remedies within the state, and have to some extent prevailed in the political forum by lifting the ban on fallow deer. In addition, the exceptions are perhaps the only reasonable means of working toward the evenhanded prohibition of all privately owned animals of the affected species. Because the considerations that would weigh in favor of a heightened scrutiny are absent, we apply the test for evenhanded regulations with incidental burdens on interstate and foreign commerce. *See Clover Leaf Creamery*, 449 U.S. at 473 n.17.

3. *Summary Judgment*

Summary judgment is appropriate "if the pleadings . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that might allow judgment in favor of the party opposing summary judgment. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The mere existence of disputed facts does not preclude summary judgment. If the nonmoving party could not prevail even if the factfinder accepts all of its evidence as true, the moving party is entitled to summary judgment. All reasonable inferences from the evidence must be made in favor of the nonmoving party. *Id.* at 631.

PNVP argues that it raised issues of material facts as to whether the state had legitimate interests that are addressed by the regulations, and whether the regulations' burden on interstate and foreign commerce is clearly excessive in relation to the state's interests. PNVP further argues that it has raised material factual issues regarding available alternatives that would protect the state's interests as well, which could affect the determination of whether the burdens on commerce are excessive.

a. *The State's Interests*

The state's putative interests to be served by these regulations are to protect its native wildlife from diseases and parasites, to maintain the genetic purity of its wildlife, to protect its wildlife from competition for forage and habitat, and to ensure that native wildlife will not be

captured and added to captive herds. Clearly, the protection of wildlife is one of the state's most important interests. *See Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (state interest in protection of wild animals is similar in importance to interest in protecting health and safety of citizens). PNVP argues, however, that this is not the real purpose behind the regulations, and speculates that the real reason for the regulations is traditional antipathy of wildlife biologists toward game farming.

PNVP has failed to offer evidence that could legally support an inference that the Department was not actually concerned about the health of Washington's wildlife. PNVP argues that other species that might as easily transmit the diseases and parasites that concern the Department have not been banned, and that from this fact, the district court was required to make the inference in PNVP's favor that the state's interest was not actually in the health of its wildlife. But the Supreme Court has long held that the fact that a state regulation addresses only one aspect of a problem does not alone cast doubt on the state's motivation. *See Clover Leaf Creamery*, 449 U.S. at 466 (citing equal protection cases), 473 (incorporating discussion of state's interest for equal protection analysis into Commerce Clause analysis). Thus, the district court could not infer that the state's purported interests were not its actual interests based on the state's failure to prohibit other carriers of diseases. *See T.W. Elec. Serv.*, 809 F.2d at 631 (inference may be drawn only if reasonable and permissible under governing substantive law).

[3] PNVP also argues that the Department could not actually be interested in genetic purity because the state formerly released animals imported from out of state to

supplement its native herds. However, PNVP fails to present any reason, either legal or factual, why the court could reasonably disbelieve the Department simply because current policy makers disagree with past policy makers as to the desirability of releasing non-indigenous animals into the wild. PNVP has thus failed to offer legally sufficient evidence from which a factfinder could infer that the state's putative interests were not its actual interests.

b. *Burdens On Interstate and Foreign Commerce*

PNVP also argues that it has shown an issue of material fact as to whether the regulations' impacts on interstate and foreign commerce are clearly excessive in relation to the putative benefits. As an initial matter, we must determine whether the impacts on foreign commerce are subject to a higher standard than that generally applied to regulations that burden interstate commerce. PNVP's Foreign Commerce Clause argument is based on the exchange of animals for breeding between British Columbia and Washington, the shipping of animals from British Columbia to Washington for slaughter, and the importation of semen from New Zealand.

The Supreme Court has indicated that when state regulations affect foreign commerce, additional scrutiny is necessary to determine whether the regulations "may impair uniformity in an area where federal uniformity is essential," *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979), or may implicate "matters of concern

to the whole nation . . . such as the potential for international retaliation." *Kraft General Foods v. Iowa Dep't of Revenue*, 112 S.Ct. 2365, 2370 (1992).

[4] This is not a matter in which national uniformity is important. Most states and Canadian provinces ban some species of wildlife, and the lists of prohibited species vary widely. *Compare, e.g.*, Mont. Admin. R. 12.6.1515(5)-(6) *with* Idaho APA 13.01.10 §§ 700.03, 701. PNVP has offered no evidence that differing regulations in the various states create any particular difficulties for those who export these animals from other countries.

[5] PNVP has suggested no other reason why international commerce in these animals might be of concern to the whole nation. In light of the fact that many borders, including those of Alberta and British Columbia, are already closed to these animals due to the very risks that concern the Washington Department of Wildlife, it is difficult to see how Washington's ban on importation would offend foreign nations. Because the concerns that would weigh in favor of a higher burden on the Department due to the regulations' impact on foreign commerce are absent here, we analyze the burden on foreign commerce in the same manner that we analyze the burden on interstate commerce.

In *Pike v. Bruce Church*, 397 U.S. 137 (1970), the Supreme Court articulated the balancing test used to determine whether evenhanded state laws and regulations are valid under the Commerce Clause:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and

> its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (internal citations omitted).

Regulations promulgated pursuant to the state's interest in the preservation of its wildlife carry a strong presumption of validity. *See Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959). To defeat the Department's motion for summary judgment, PNVP was required to show that it could offer evidence at trial legally sufficient to support a determination that the impacts of the regulations on interstate and foreign commerce are so great that they outweigh this vital state interest. Evidence that interstate and foreign commerce is in some way affected by the regulations is not enough to meet his burden; what is required is evidence that these effects are of a type or an extent that could support a determination that they are "clearly excessive" in relation to the state's interest in the health of its native wildlife. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986) (plaintiff must produce evidence sufficient to support a jury verdict); *New York State Trawlers Assoc. v. Jorling*, No. 93-7571, ___ F.3d ___, 1994 WL 12677 (2d Cir., Jan. 18, 1994). PNVP has failed [sic] show that it could produce such evidence.

A review of recent Supreme Court cases reveals that certain types of impacts on interstate commerce are of special importance in the balance with the state's putative interest. These impacts include the disruption of travel and shipping due to a lack of uniformity in state laws, *see Raymond Motor*, 434 U.S. at 445; *Bibb*, 359 U.S. at 526-27; impacts on commerce beyond the borders of the defendant state, *see Healy v. Beer Institute*, 491 U.S. 324, 337 (1989); and impacts that fall more heavily on out-of-state interests, *see Clover Leaf Creamery*, 449 U.S. at 473. Because the purpose of the Commerce Clause is to protect the nation against economic Balkanization, *Wardair Canada v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986), legitimate regulations that have none of these effects arguably are not subject to invalidation under the Commerce Clause. *See Clover Leaf Creamery*, 449 U.S. at 473 (applying "clearly excessive" test only after "granting that the out-of-state . . . industry is burdened relatively more heavily than the [in-state] industry"); *New York State Trawlers*, ___ F.3d at ___ ("incidental burdens are the burdens on interstate commerce that exceed the burdens on intrastate commerce"); *Old Bridge Chemicals v. New Jersey Dep't of Environmental Protection*, 965 F.2d 1287, 1295 (3d Cir.) (only discriminatory burdens are considered in balancing test), *cert. denied*, 113 S. Ct. 602 (1992); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 507 (7th Cir.) (in absence of discrimination, "argument that Wisconsin's law hinders the flow of traffic 'too much' " foreclosed by Supreme Court precedent), *cert. denied*, 493 U.S. 955 (1989). *Contra Dorrance*, 957 F.2d at 764 (nondiscriminatory burdens included in balancing test).

[6] Not only has PNVP failed to show that the regulations may have impacts of federal concern, it also has failed to offer evidence that could support a finding of anything more than a minimal economic impact on interstate or foreign commerce. Although the summary judgment record describes the *nature* of the impacts on interstate and foreign commerce (i.e., foreclosure of the exchange of breeding stock between Washington and other states and Canada, the purchase of semen from New Zealand, and the importation of animals from British Columbia and Oregon for slaughter), the record lacks any indication of the *extent* of the commercial activities that have been foreclosed. PNVP has offered no evidence indicating how many animals were previously shipped to Washington from British Columbia and Oregon. We do not know if movement of animals between Washington and other states and countries is valued in hundreds of dollars per year (or less) or in hundreds of thousands of dollars per year (or more). Most importantly, PNVP has offered no evidence that these regulations will have any economic effect on consumers or members of the industry in other states and countries. PNVP has simply failed to show that it can produce any evidence that could support a holding that the regulations' impact on interstate and foreign commerce is clearly excessive in relation to an interest as important as the protection of native wildlife. *Cf. Burlington Northern Ry. Co. v. Department of Public Serv. Reg.*, 763 F.2d 1106, 1114 (9th Cir. 1985); *New York State Trawlers*, ___ F.3d at ___.

Finally, PNVP argues that it has offered evidence that less burdensome alternatives would protect the state's wildlife as well as the regulations do. Because "the extent

of the burden that will be tolerated" depends in part on whether the state's interest "could be promoted as well with a lesser impact on interstate activities," *see Pike*, 397 U.S. at 142, such evidence may create a material dispute as to whether the burden on interstate commerce outweighs the state's interest. While the lack of evidence as to what the extent of the burden *is* makes the determination of "the extent of the burden that will be tolerated" problematic, we proceed on the assumption that overwhelming evidence that the regulations are unnecessary could add enough force to the mere existence of burdens on interstate commerce to overcome the presumption that the regulations are valid.

PNVP's suggested alternatives include testing for diseases and parasites, quarantine for the length of time that it takes to establish whether an animal has a particular disease or parasite, tagging to ensure that animals are not imported from the East, heavy fencing to prevent escapes, and increased law enforcement. PNVP has offered evidence in the form of expert opinions that these alternatives combined with the alleged propensity of animals to return after escaping can adequately reduce the risks to native wildlife.

The bulk of the evidence offered by PNVP consists of expert affidavits stating that the increase in risks present in its proposed alternatives is acceptable when considered against the regulations' effect of foreclosing the commercial movement of these animals in and out of Washington. How much risk to wildlife is acceptable, however, is quintessentially a legislative determination. It is the role of the state, and not of the courts, to determine how much risk to the state's wildlife is acceptable in the

balance with private economic interests. Nonetheless, we assume that at some point the risks presented by proposed alternatives as compared to challenged regulations would be so small that courts should not give them credence. PNVP has arguably offered evidence that could support a finding that its proposed alternatives would reduce the risks to that point.

There are significant gaps in PNVP's offering, however. In particular, PNVP has produced very little to counter the Department's expert affidavits stating that alternatives similar to those proposed by PNVP have proven ineffective in other states and provinces due to accidents and illegal activity. In response to the Department's expert affidavits alleging extensive and specific facts showing that these animals have a tendency to escape regardless of the measures taken to secure them, and that they often are never recovered, PNVP offered an expert's unsupported opinion that animals have a propensity to return to their captive herds and to a ready supply of food. In response to the Department's affidavits describing illegal activity that has occurred in other states and provinces, including the alteration of tags in order to bring animals in from the East and the capture of wild free-ranging elk to supplement captive herds, PNVP experts opine that increased law enforcement efforts would eliminate the threat of such activity.

[7] We doubt that these expert opinions as to the efficacy of PNVP's proposed alternatives could support a factual finding in PNVP's favor. *See In re Apple Computer Securities Litigation*, 886 F.2d 1109, 1116 (9th Cir. 1989) ("where the evidence is as clear as that in this record, the court is not required to defer to the contrary opinion of

plaintiffs' 'expert' "), *cert. denied*, 496 U.S. 943 (1990). We need not decide whether the offered evidence could support a determination that the proposed alternatives would serve the state's interest as well as the Department's regulations, however, because the evidence is too inconclusive to have a significant effect on the balance between the burdens on interstate commerce and the state's putative interests. If the determination could not, as a matter of law, tip the balance against the Department, the issue is not material to the outcome of the case.

Here, the tenuousness of PNVP's offered evidence is dispositive. When the evidence as to the efficacy of proposed alternatives is as disputed and as inconclusive as it is in this case, it would simply be inappropriate for a court to substitute its judgment for that of the Department of Wildlife in deciding which expert testimony to credit. Particularly when the extent of the risks is in dispute, the Department is clearly permitted to err on the side of excess in taking precautionary measures:

> [The state] has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. The constitutional principles underlying the commerce clause cannot be read as requiring the State . . . to sit idly by and wait until potentially irreversible environmental damage has occurred . . . before it acts to avoid such consequences.

Maine v. Taylor, 477 U.S. at 148 (internal quotation omitted).

Even in the context of dormant commerce clause analysis, the Supreme Court has frequently admonished

that courts should not "second-guess the empirical judgments of lawmakers concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987) (citation omitted). The Supreme Court has never held that its approach of considering equally effective alternatives in the balance between the burden on commerce and the state's interest negates the state's role in deciding how certain the effectiveness of those alternatives must be in order to be acceptable. To the contrary, in *Maine v. Taylor*, the Court stated that although the plaintiffs had presented expert testimony that a ban on imports was not required to protect native baitfish, the record in that case probably could not support a finding that the proposed alternatives were equally effective, in light of the uncertainty as to whether diseases carried by imported baitfish might prove dangerous. *See id.* at 146-48.

Only if PNVP were able to conclusively establish that its alternatives would eliminate risks to native wildlife could we overturn the Department's decision to err on the side of safety. *Cf. Raymond Motor*, 434 U.S. at 447-48 (regulation overturned where evidence was "overwhelmingly one-sided" that it did not contribute to state's putative interest). It is clear from the summary judgment record that such conclusiveness is not possible in this case.

CONCLUSION

Plaintiffs in this case have expended considerable time and money in an economic endeavor, only to have their state government subsequently deem that endeavor

to be potentially harmful, and therefore prohibited. We note that the district court held that the federal constitution provides some protection in such a situation through its guarantees of procedural due process and of just compensation for the taking of property. In the absence of the evidence either of economic protectionism on the part of the state, or of substantial burdens on interstate or foreign commerce, however, we must conclude that the Commerce Clause does not protect their economic investment against legitimate state regulations protecting native wildlife.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC NORTHWEST VENISON PRODUCERS, et al., Plaintiffs, v. CURT SMITCH, et al., Defendants.	NO. C92-1076WD MEMORANDUM DECISION, INJUNCTION, AND ORDER SETTING BRIEFING SCHEDULE (Filed Sept. 2, 1992)

I. INTRODUCTION

Plaintiffs Pacific Northwest Venison Producers, Washington Alternative Livestock Association, Robert V. Baker, D. Bruce Morgan, and James E. Rich have sued Curt Smitch, director of the Washington State Department of Wildlife (the "Department"), the Department itself, and members of the Washington State Wildlife Commission (the "Commission") in regard to emergency regulations enacted by the Commission on June 19, 1992. The emergency regulations ban the importation, release, possession, propagation, sale, or transfer (with certain exceptions) of several mammal species of wildlife. Plaintiffs are, or represent, ranchers who raise some of the affected species commercially. They claim that the emergency regulations – especially the immediate ban on propagation, which went into effect just before a breeding season – would put them out of business. They allege that the

regulations are unconstitutional in that they take property without just compensation, deny plaintiffs due process of law and equal protection, and violate the Commerce Clause. They also contend that the regulations conflict in part with the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.* (1973), and the Animal Welfare Act, 7 U.S.C. § 2131, *et seq.* (1970). Plaintiffs seek declaratory relief and an injunction barring enforcement of the regulations, and damages from individual defendants. Defendants deny plaintiffs' claims, and assert immunity under the Eleventh Amendment.

On July 15, 1992, the court denied plaintiffs' motion for a preliminary injunction, except to enjoin temporarily the enforcement of the propagation ban as to plaintiff Morgan's sika deer (*Cervus nippon keramae*), a federally-listed endangered species. Oral argument was heard on August 10, 1992, on all parties' motions for summary judgment. Pending a ruling on the summary judgment motions, the court on August 11 temporarily enjoined enforcement of the propagation ban as to all species and of the ban on importation of animals from British Columbia solely for slaughter. These orders were conditioned on compliance with all applicable health inspection and safe-confinement requirements. The other parts of the challenged regulations have remained in effect pending a decision on the merits.

II. BACKGROUND OF WILDLIFE REGULATIONS

Washington by statute authorizes the Department and the Commission to regulate transactions involving wildlife. *See* RCW 77.12.020-.040. The state also permits

its agencies to adopt regulations without observing the prescribed time requirements for notice or public comment if necessary to preserve the public health, safety and welfare. RCW 34.05.350. The latter statute requires that agencies include in any emergency regulation a statement of the justification for dispensing with the normal rulemaking requirements, which include receiving written comments, holding a public hearing (RCW 34.05.325(1)(2)), and publishing notice of the public hearing with a summary of the proposed rule in the state register at least twenty days before the hearing (RCW 34.05.320).

The regulations codified at WAC 232-12-017 and 232-12-064, both adopted in 1981, regulate "deleterious exotic wildlife" and "live wildlife" respectively. In January 1991, following the normal notice and comment procedures, the Commission amended WAC 232-12-017 to prohibit the importation, holding, possession, propagation, sale, transfer or release of aoudad and mouflon sheep and certain other species.

On June 19, 1992, the Commission, by emergency regulation, amended WAC 232-12-017, adding several species including fallow deer and sika to the list of deleterious exotic wildlife, thereby making it unlawful to "import into the state, hold, possess, propagate, offer for sale, sell, transfer, or release," with certain exceptions, such animals. By a second emergency regulation, the Commission on the same day amended WAC 232-12-064 to make it unlawful to import into the state, hold, possess, propagate, offer for sale, sell, transfer, or release elk and other designated species, with certain exceptions.

Under both of the June 1992 regulations, the exceptions provide that animals acquired before June 20, 1992, may be retained if securely confined, and not propagated, sold, transferred or released, except that they may be sold or transferred for slaughter, or for export from the state, or to zoos. The exceptions also allow the importation, holding, and possession of animals by zoos or for research.

The emergency regulations are effective for 120 days from adoption, a period that covers most of the 1992 breeding season for the mammals in question.

The stated justification for emergency amendment of WAC-232-12-017 is as follows:

> The director of the Department of Wildlife has found the additional species of animals to be dangerous to the environment and/or the wildlife of the state. An immediate restriction on further importation, possession, transfer, is necessary to prevent harm to the environment and/or wildlife of the state.

The justification for emergency amendment of WAC 232-12-064 states:

> The director and commission have found that the importation, possess [sic], sale, release and/or transfer within the state of the listed species, pose a serious threat to the health of native wildlife.

The Commission is currently holding hearings across the state with a view to adopting permanent regulations for elk, sika, and fallow deer.

III. SUMMARY JUDGMENT STANDARD

Summary judgment under Fed. R. Civ. P. 56 may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. An issue of material fact is one that affects the outcome of the case and requires a trial to resolve differing versions of the truth. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). In deciding the motion the court views the evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in that party's favor. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). However, the non-moving party must respond to an adequately supported motion by showing that a genuine issue of material fact exists; if the response falls short of that, summary judgment should be granted. Fed. R. Civ. P. 56(e); *T.W. Elec. Serv., Inc.*, 809 F.2d at 630-31.

Here, there is no genuine issue of material fact and summary judgment is appropriate.

IV. FACTS

The following facts are undisputed:

Plaintiff Pacific Northwest Venison Producers is a cooperative of deer farmers in Washington, Oregon and British Columbia, Canada. Plaintiff Washington Alternative Livestock Association is a trade association. Plaintiff Baker raises elk in Spokane County, Washington. Plaintiff

Morgan raises the endangered sika, *Cervus nippon keramae*, on Speiden Island and in King County, Washington. Plaintiff Rich raises the sika subspecies *Cervus nippon hortulorum* and fallow deer in Whatcom County, Washington. The plaintiffs raise these animals for breeding stock and slaughter.

The June 19, 1992, regulations were adopted following several months of investigation by the Department. The Department became concerned about potential animal escapes resulting in competition for forage, and possible hybridization, with native wildlife in Washington. It was concerned as well about the possibility of bovine tuberculosis, brucellosis, or meningeal worm appearing in the state's wildlife. At the July 15 hearing on plaintiffs' motion for a preliminary injunction, defendants argued that the regulations were justified by a reported July 1991 occurrence of bovine tuberculosis among plaintiff Baker's elk and a second tuberculosis outbreak on a Montana fallow deer farm that had acquired animals from Washington. Based upon information acquired after the hearing, defendants now agree that both reports were false. The correct information was available before June 19. Neither bovine tuberculosis nor meningeal worm has ever been detected in Washington wildlife.

Several wildlife experts from other states were invited to brief the Commission at a June 17, 1992, meeting. However, the Washington State Veterinarian, who is responsible for monitoring diseases in the state's animals, was not invited to speak. During the Department's months-long investigation, plaintiffs had repeatedly asked for a chance to address the Commission. Although defendants acknowledge they could have given plaintiffs

an opportunity to speak, the Commission adopted the June 19 regulations without doing so.

V. ANALYSIS

A. Eleventh Amendment

The Eleventh Amendment prohibits suits in federal court against a state by citizens of that state or another state. *Hans v. State of Louisiana,* 134 U.S. 1 (1890). The claims against the Department and the Commission, state agencies, must be dismissed. *See Quern v. Jordan,* 440 U.S. 332 (1979); *Belanger v. Madera Unified School Dist.,* 963 F.2d 248 (9th Cir. 1992).

The Eleventh Amendment, however, does not bar a suit seeking to enjoin a state official from enforcing an unconstitutional law. *Ex Parte Young,* 209 U.S. 123 (1908). Further, when a state official is sued for damages on the basis that he or she personally caused a deprivation of federal rights, "[t]he Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of the 'official' nature of their acts." *Hafer v. Melo,* 112 S.Ct. 358 (1991). Plaintiffs' claims against the individual defendants are not barred.

B. Procedural Due Process

The court of appeals in *Sierra Lake Reserve v. City of Rocklin,* 938 F.2d 951, 956 (9th Cir. 1991), *petition for cert. filed,* 60 U.S.L.W. 3843 (May 4, 1992) (No. 91-1925), summarized the requirements of a procedural due process claim as follows:

> A claim for violation of procedural due process has two components. First, plaintiff must show that a protected property interest was taken. Second, it must show that the procedural safeguards surrounding the deprivation were inadequate. *See Board of Regents v. Roth*, 408 U.S. 564, 568-69, 92 S.Ct. 2701, 2704-05, 33 L.Ed. 2d 548 (1972).

See also Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

There is no doubt here that protected property interests of the plaintiffs are affected and diminished by the regulations. Plaintiffs would lose valuable rights to maintain and market their livestock and to put their land to certain uses. *See Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990).

It is also clear that the procedural due process claim is ripe for decision. Although the emergency regulations are temporary, their practical effect will be to restrict severely and immediately, if not extinguish, the plaintiffs' businesses. *See Harris*, 904 F.2d at 501.

The central requirement of procedural due process, where a person is entitled to it, is the right to be heard:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Harris, 904 F.2d at 503, *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See also Mathews*

v. Eldridge, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "), *quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The Commission here rejected plaintiffs' requests to be heard. There was ample time to allow plaintiffs to speak or otherwise register their objections. Had that been done the outcome might have been different – for example, the falsity of the reports about tuberculosis which the Commission relied upon might have been revealed. For whatever reason, the Commission chose to hear from witnesses invited by it while refusing to hear from the ranchers whose businesses would be affected.

The question is whether this denial of a hearing violated the Fourteenth Amendment – whether, that is, the plaintiffs had a procedural due process right to be heard or otherwise to state their objections.

In *Sierra Lake, supra*, 938 F.2d at 957, the court noted the long-standing distinction between "legislative" and "adjudicative" governmental actions. In the former, procedural due process is ordinarily satisfied if the legislative body "performs its responsibilities in the normal manner prescribed by law." *Id.* In the latter, the persons affected have the right to present their objections. *See, e.g.*, Rotunda, Nowak and Young, *Treatise on Constitutional Law: Substance and Procedure* § 17.8 (1986).

It is the substance of the governmental action, however, rather than the label placed on it, that determines whether the right to be heard attaches. As the court of appeals held in *Harris*, 904 F.2d at 501-02:

> In determining when the dictates of due process apply, however, we find little guidance in formalistic distinctions between "legislative" and "adjudicatory" or "administrative" government actions. As the Supreme Court impliedly recognized in *Bi-Metallic [Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915)], the character of the action, rather than its label, determines whether those affected by it are entitled to constitutional due process.

Parts of the regulations challenged here are of a general legislative nature and could constitutionally be adopted without affording the plaintiffs a chance to be heard. This applies to the prohibitions on release, importation, and transfer. These prohibitions are general, prospective, and not aimed at a particular person or small group.

In contrast, the prohibition on propagation of animals now owned cannot be deemed merely "legislative." The Commission in that respect was dealing with a small and readily identifiable group of ranchers – in fact, a group that had repeatedly asked to be heard – whose businesses would be damaged or ended by the regulations. The plaintiffs were entitled to present their objections before this measure, aimed at them, was adopted. In point is *Harris, supra*, where the court of appeals held that a landowner whose property was specifically targeted for a zoning change as part of a general land use plan was entitled to individual notice and an opportunity to be heard. *See also Williams v. Barry*, 708 F.2d 789 (D.C. Cir. 1983) (inhabitants of District of Columbia's shelters for homeless entitled to notice and opportunity for written comment before mayor closed all shelters); *Appalachian*

Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973) (affected parties entitled to notice and opportunity to present objections to state's proposed Clean Air Act emissions plan); *Neighborhood Toxic Cleanup Emergency v. Reilly*, 716 F. Supp. 828 (D.N.J. 1989) (EPA required to provide notice and allow public comment before beginning cleanup of landfill that could affect people living in vicinity).

The purported emergency nature of the regulations did not justify dispensing with the requirements of notice and an opportunity to comment. "Notwithstanding the deference accorded to officials exercising summary powers to protect the public, their power to declare an emergency and thus eliminate the constraints of the due process clause is not without bounds." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1406 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). The emergency exception does not apply when there is "no justification for the [government's] failure to give plaintiffs notice and an opportunity for a hearing." *Id. See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982). Here, the regulations at issue did not address an urgent crisis but rather potential problems that had been under study for many months. The Commission planned and held a meeting, but refused to accept input from those who would be immediately affected by its decision. On the undisputed facts, no emergency existed that would excuse compliance with any applicable due process requirements.

C. Taking without Just Compensation

Plaintiffs' federal taking claim is not ripe. The Fifth Amendment does not "require that compensation be paid

in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (internal quotations omitted). "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation." *Id.* at 195. The ripeness of a taking claim is a jurisdictional requirement that cannot be waived. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990).

Washington courts permit inverse condemnation suits for regulatory takings under Article I, § 16 of the Washington Constitution. *See, e.g., Sinntra, Inc. v. City of Seattle*, 119 Wn.2d 1 (1992). Because plaintiffs have not exhausted that remedy, they may not litigate a federal taking claim. The claim must be dismissed without prejudice. As a result, the court need not decide whether the Commission's regulations could be deemed a "taking" in the first place.

D. Commerce Clause

Regulations are tested under the Commerce Clause if they affirmatively discriminate against interstate commerce, or are even-handed but incidentally burden interstate commerce. *Maine v. Taylor*, 477 U.S. 131 (1986); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1462 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). Regulations in the first group

violate the Commerce Clause "only if the burdens they impose on interstate trade are clearly excessive in relation to the putative local benefits," whereas those in the second group violate the clause unless the state can show that they "serve[] a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. at 138 (internal quotations and citations omitted).

The court need not decide which standard applies here because the challenged regulations withstand the higher level of scrutiny applicable to overt discrimination. The state's interest in preventing disease, hybridization, and competition for forage is legitimate, despite disagreement on the magnitude of these threats. A state has "a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they might ultimately prove to be negligible." *Maine, supra*, at 148. It need not "sit idly by and wait until potentially irreversible environmental damage has occurred, or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences." *Id.* at 148 (internal quotations omitted). Plaintiffs contend that Washington's interest could be served as well by nondiscriminatory means, such as testing imported animals for disease, but they admit that such tests are not completely accurate. The existence of testing procedures, "particularly when there is no assurance as to their effectiveness, does not make those procedures an available nondiscriminatory alternative." *Id.* at 147 (internal quotations omitted).

The regulations do not impermissibly interfere with foreign commerce. State regulations touching foreign

commerce are permitted when, as here, they do not significantly affect national concerns. *Bob-Lo Excursion Co. v. State of Michigan*, 333 U.S. 28, 40 (1948); Laurence H. Tribe, *American Constitutional Law*, p. 469 (2d ed. 1988).

E. Substantive Due Process and Equal Protection

The court must decide not whether the regulations are wise or desirable, but whether they are constitutional. Because the defendants' actions neither infringed a fundamental interest nor discriminated against a suspect class, they satisfy substantive due process if they bear a "rational relation to a legitimate government interest." *City of Las Vegas, Nevada. v. Clark County, Nevada*, 755 F.2d 697, 704 (9th Cir. 1984). The test is the same under the Equal Protection Clause. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990). The defendants' actions here bear a rational relation to the legitimate interest in protecting native wildlife. As a matter of law, there has been no violation of either constitutional provision.

F. Preemption

"[C]ourts sustain a local regulation unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of circumstances that Congress sought to occupy the field to the exclusion of the States." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985).

The ESA preempts state laws that allow acts prohibited by the ESA. 16 U.S.C. § 1535(f). It prohibits acts that significantly disrupt breeding of an endangered species

such as *Cervus nippon keramae*. 16 U.S.C. §§ 1538(1) and 1532(19); 50 C.F.R. §§ 17.3 and 17.11(g) (1991). Because the propagation ban is such an act, it is void as applied to *Cervus nippon keramas*, and defendants may not enforce it. The remaining provisions of the regulations are not preempted by the ESA.

The ESA's requirement that a sixty-day notice be given before a citizen suit is filed may be waived if its enforcement "would work an injustice to the adjudication of plaintiffs' claim" and "would produce no added evidence which would help this court in its decision." *Sierra Club v. Froehlke*, 392 F. Supp. 130, 143 (E.D. Mo. 1975), *aff'd*, 534 F.2d 1289 (8th Cir. 1976). Here, dismissal of plaintiffs' ESA claim for lack of notice would be unjust in view of defendants' failure to give notice of the wildlife regulations. A sixty-day delay would have eliminated any chance for the plaintiffs to obtain relief in time to salvage this year's breeding season. Defendants have not asserted a need for more time to prepare their case, and have provided evidence sufficient for a decision of the summary judgment motions.

The regulations do not conflict with or frustrate the Animal Welfare Act, which is intended to insure humane treatment and prevent theft of animals.

VI. CONCLUSION

For the reasons stated, plaintiffs' claims are dismissed under the Eleventh Amendment as to defendants the Department and the Commission. Plaintiffs' taking claim is dismissed without prejudice. To the extent stated, plaintiffs' motion for summary judgment is granted as to

the procedural due process claim, and the individual defendants are enjoined from enforcing the June 19, 1992, regulations insofar as they prohibit plaintiffs from propagating their animals. The foregoing also provides the relief plaintiffs are entitled to under the ESA as to the endangered sika. In all other respects, plaintiffs' motion for summary judgment is denied and defendants' motion for summary judgment is granted.

The parties are directed to submit briefs not to exceed ten pages per side (not per party) on September 16, 1992, as to whether the damages claims against the individual defendants should be dismissed on the basis of qualified immunity.

The clerk is directed to send copies of this order to all counsel of record.

Dated: September 2, 1992.

/s/ William L. Dwyer
William L. Dwyer
United States
District Judge

Washington State Register, Issue 92-14

WSR 92-14-014
EMERGENCY RULES
WILDLIFE COMMISSION

[Order 558 – Filed June 19, 1992, 4:51 p.m.]
Date of Adoption: June 19, 1992.

Purpose: To identify and designate certain wildlife species and restrict their importation, possession, propagation, sale, transfer and/or release.

Citation of Existing Rules Affected by this Order: Amending WAC 232-12-021 and 232-12-064.

Statutory Authority for Adoption: RCW 77.12.030.

Pursuant to RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The director and commission have found that the importation, possess [sic], sale, release and/or transfer within the state of the listed species, pose a serious threat to the health of native wildlife.

Effective Date of Rule: Immediately.

June 19, 1992
Curt Smitch
Director
for Dean A. Lydig
Chair

AMENDATORY SECTION (Amending Order 177, filed 1/28/82)

WAC 232-12-021 ((~~IMPORT~~)) IMPORTATION AND RETENTION OF DEAD NONRESIDENT WILDLIFE. It is unlawful:

(1) To import or possess dead wildlife, taken in another state or country, into Washington unless ((~~the~~)) such wildlife was acquired lawfully. Proof of legal acquisition must be retained during the period of retention of the carcass or edible parts.

(2) For a person who imports a dead mountain sheep, mountain goat, cougar or bear to fail to report such importation to the department in writing within ten days of the importation. The report must contain the name and address of the importer, the location where the dead wildlife is being ((~~held~~)) stored and general information describing where and how the wildlife was obtained.

AMENDATORY SECTION (Amending Order 243, filed 4/5/85)

WAC 232-12-064 LIVE WILDLIFE. Taking from the wild, importation, possession, transfer, holding in captivity.

(1) It is unlawful to take live wild animals, wild birds, or game fish from the wild without a permit provided for by rule of the commission.

(2) Notwithstanding the provisions of WAC 232-12-027(1) and WAC 232-12-067, it is unlawful to import in to the state, hold, possess, propagate, offer for sale, sell, transfer, or release live specimens of wildlife listed in this

subsection, their gamets and/or embryo, except as provided under subsections (9) or (10) below.

In the family Cervidae, all of the following species:

Roosevelt and Rocky Mountain elk

Cervus elaphus

Mule deer and Black-tailed deer

Odocoileus hemionus

White-tailed deer

Odocoileus virginianus

Moose

Alces alces

((~~(2)~~)) (3xu) It is unlawful to import into the state or to hold live wildlife which were taken, held, possessed or transported contrary to federal or state law, local ordinance or commission rule. Live wild animals, wild birds or game fish shall not be brought into the state without first presenting veterinarian or fish pathologist certification to the department that the wildlife is disease free and that the area from which acquired has no history of wildlife disease which may pose a risk to wildlife in this state. Proof of lawful importation must be produced for inspection on request of a department employee.

((~~(3)~~)) (4) It is unlawful to possess or hold in captivity live wild animals, wild birds, or game fish unless lawfully acquired and possessed. Proof of lawful acquisition and possession must be produced for inspection on request of a department employee. Such proof shall contain: (1) Species; (2) age and sex of animal; (3) origin of animal; (4) name of receiving party; (5) source-name and address; (6) invoice/statement date; and (7) documentation of prior transfers.

((~~(4)~~)) (5) *Wildlife held in captivity which becomes diseased must immediately be placed under the professional care of a licensed veterinarian or certified fish pathologist, and such incident reported immediately to the department by the owner. If diseased wildlife present a threat to the wildlife of the state, the director may order such actions as necessary, including quarantine or destruction of stock, sterilization of enclosures and facilities, cessation of activities and disposal of the wildlife in a manner satisfactory to the department.*

((~~(5)~~)) (6) *Live wild animals, wild birds or game fish held in captivity or their progeny or parts thereof may not be sold or otherwise commercialized on except as provided by rule of the commission.*

((~~(6)~~)) (7) *No wildlife shall be released from captivity except as provided in WAC 232-12-271, except that it is lawful to return to the waters from which caught, game fish caught and subsequently kept alive on stringers, in live wells or other containers while fishing. The release of fish into any waters of the state, including private, natural or man-made ponds requires a fish planting permit.*

((~~(7)~~)) (8) *All live wildlife possessed or held in captivity, and the area where held, must be open to inspection by department personnel at reasonable times.*

(9) Scientific Research or Display: The director may authorize a person to import into the state, hold, or possess live specimens of wild animals listed in subsection (2) for scientific research or for display by zoos or aquariums who are accredited institutional members of the American Association of Zoological Parks and Aquariums (AAZPA) provided:

(a) The specimens are confined to a secure facility.

(b) The specimens will not be transferred to any other location, except to and by other AAZPA accredited facilities with written approval of the director.

(c) The specimens will not be sold or otherwise disposed of without written approval of the director, and

(d) The person will keep such records on the specimens and make such reports as the director may require.

(10) Retention or Disposal of Existing Specimens in Captivity: A person holding live specimens of those wild animals listed in section (2) may retain such specimens he/she lawfully possessed prior to June 20, 1992 provided:

(a) The person reports to the director in writing by July 31, 1992, and thereafter annually or as otherwise required by the director, the species, number and location of the specimens.

(b) The specimens are confined to a secure facility at the location reported.

(c) Live specimens are not propagated, sold, transferred, or released, except:

(i) Live specimens in lawful possession prior to June 20, 1992 may be permanently removed from the state of Washington pursuant to sale or gratuitous transfer or transported directly to slaughter where in accordance with other applicable law.

(ii) Federally listed endangered or threatened species may be transferred to AAZPA facilities with written approval of the director.

(iii) Live specimens may be moved to the new primary residence of the possessor with the written approval of the director, provided all other requirements are satisfied and the total number of locations where animals are held is not increased, and

(d) Live specimens shall be permanently marked for identification in a manner determined by the director.

(e) Live specimens shall be neutered, physically separated by sex and/or rendered infertile by means of contraception.

(11) Persons legally possessing wildlife must notify the director within ten days of any change of address or location of the holding facility, and any transfer or sale of live specimens in possession allowed hereunder.

(12) Escaped Animals: Escaped wildlife will be considered a public nuisance. The department or any peace officer may seize, capture, or destroy wildlife that have escaped the possessor's control. The former possessor may be responsible for costs incurred by the department in recovering, maintaining, or disposing of such animals, as well as any damage to the state's wildlife or habitat.

(13) Secure Facility: For the purposes of this rule a "secure facility" is an enclosure so constructed as to prevent any danger to the environment or wildlife of the state, including escape of the animals contained therein or ingress of or contact with resident wildlife. The adequacy of the facility shall be determined by the director or agents of the director, in their sole discretion.

WSR 92-14-015
EMERGENCY RULES
WILDLIFE COMMISSION

[Order 559 – Filed June 19, 1992, 4:54 p.m.]

Date of Adoption: June 19, 1992.

Purpose: To identify deleterious exotic wildlife and restrict their importation, possession, propagation, sale, transfer and/or release.

Citation of Existing Rules Affected by this Order: Amending WAC 232-12-017.

Statutory Authority for Adoption: RCW 77.12.020 and 77.12.040.

Pursuant to RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The director of the Department of Wildlife has found the additional species of animals to be dangerous to the environment and/or the wildlife of the state. An immediate restriction on further importation, possession, transfer, is necessary to prevent harm to the environment and/or wildlife of the state.

Other Findings Required by Other Provisions of Law as Precondition to Adoption or Effectiveness of Rule: A determination by the director of the Department of Wildlife that the listed species are dangerous to the environment or wildlife of the state pursuant to RCW 77.12.020.

Effective Date of Rule: Immediately.

June 19, 1992
Curt Smitch
Director
for Dean A. Lydig
Chair

AMENDATORY SECTION (Amending Order 482, filed 1/17/91)

WAC 232-12-017 DELETERIOUS EXOTIC WILDLIFE. ((~~Deleterious exotic wildlife includes:~~))

(1) ((~~Fish~~)) The following animals are hereby designated as deleterious exotic wildlife:

(a) Fish

((~~(a)~~)) (i) In the family Claridae, (walking catfish) all members of the family.

((~~(b)~~)) (ii) In the family Chprinidae, (Diploid Grass carp.) Ctenopharyngodon idella

((~~(c)~~)) (iii) In the family Amiidae, (bowfin, mudfish or grinnel) Amia calva

((~~(d)~~)) (iv) In the family Characidae, the piranha (also pirameba, caribe, pira, piraya, chupita, rodoleira, palometa), all species of the genera Serrasalmus, Rooseveltiella and Pygocentrus

((~~(e)~~)) (v) In the family Cyprinidae, the rudd (Scadinius erythropthalmus) and Ide (silver orfe or golden orfe (leuciscus idus))

((~~(f)~~)) (vi) In the family Lepiosteidae, the gar-pikes

((~~(g)~~)) (vii) In the family Channidae, the snakeheads (China fish) and all forms of the genus Channa (Ophicephalus)

((~~(2)~~)) (b) Amphibians

((~~(a)~~)) (i) In the family Pipidae, the African clawed frog (Xenopus laevis)

((~~(3)~~)) (c) Birds

((~~(a)~~)) (i) In the family Anatidae, the mute swan (Cygnus olor)

((~~(4)~~)) (d) Mammals

((~~(a)~~ (i) In the family Viverridae, the mongoose (all members of the genus Herpestes)

((~~(b)~~)) (ii) In the family Suidae, the wild boar (Sus scrofa and all wild hybrids)

((~~(c)~~)) (iii) In the family Tayassuidae, the collard peccary (javelina) (Tayassu tajacu)

((~~(d)~~)) (iv) In the family Bovidae, all members and hybrids of the following genera – Rupicapra (Chamois); Hemitragus (Tahr); Capra (goats, ibexes except domestic goat Capra hircus); Ammotragus (Barbary sheep or Aoudad); and Ovis (((~~only~~)) mouflon species – Ovis musimon) except domestic sheep, Ovis aries, Reedbucks (all members of the Genus Redunca), Oryx and Gemsbok (all members of the Genus Oryx), Addax (Addax nasomaculatus), Sassabies (all members of the Genus Damaliscus), Hartebeest (Alcelaphus buselaphus), Wildebeests (all members of the Genus Connochaetes), Blackbuck antelope (Antilope cervicapra), Markhor (Capra falconeri), and Marcopolo sheep (Ovis ammon)

((~~(e)~~)) (v) In the family Cervidae, the european red deer (Cervus elaphus elaphus), all nonnative subspecies of Cervus elaphus, and all hybrids with North American elk; Fallow deer (Dama dama), Axis deer (Axis axis), Rusa deer or Sambar deer (Cervus unicolor, Cervus timorensis, Cervus mariannus and Cervus alfredi), and Sika deer (Cervus Nippon).

((~~(5)~~)) (2) It is unlawful to import into the state, hold, posses, propagate, offer for sale, sell, transfer, or release live specimens of deleterious exotic wildlife, their gametes and/or embryo, except as provided under ((~~(6)~~)) (3) or ((~~(7)~~)) (4) ((~~below~~)).

((~~(6)~~)) (3) Scientific research or display: The director may authorize, by written approval, a person to import into the state, hold, or possess live specimens of deleterious exotic wildlife for scientific research or for display by zoos or aquariums who are accredited institutional members of the American Association of Zoological Parks and Aquariums (AAZPA) provided:

(a) The specimens are confined to a secure facility,

(b) the specimens will not be transferred to any other location, except to and by other AAZPA accredited facilities with written director approval.

(c) the specimens will be euthanized and all parts incinerated at the end of the project, except federally listed endangered or threatened species may be transferred to AAZPA facilities with written director approval, and

(d) the person will keep such records on the specimens and make such reports as the director may require.

((~~(7)~~)) (4) Retention or disposal of existing specimens lawfully in captivity prior to January 18, 1991: A person

holding exotic wildlife specimens in captivity which ((~~are~~)) were classified by the Wildlife Commission as deleterious exotic wildlife on or before January 18, 1991 may retain the specimens of such deleterious exotic wildlife he/she lawfully ((~~possesses~~)) possessed prior to January 18, 1991 provided:

(a) The person ((~~reports~~)) reported to the director in writing ((~~by March 18, 1991~~)) the species, number and location of the specimens as required by the existing regulations,

(b) the specimens are confined to a secure facility at the location reported, ((~~and~~))

(c) live specimens are not propagated((~~, sold, transferred, or released, except for transfer or sale to locations outside the state of Washington, except federally listed endangered or threatened species may be transferred to AAZPA facilities with written director approval.~~)); and are either neutered, physically separated by sex, and/or rendered infertile by means of contraception,

(d) Live specimens are not released.

(e) Live specimens are not sold or transferred except:

(i) Live specimens in lawful possession prior to January 18, 1991, may be permanently removed from the state of Washington pursuant to sale or gratuitous transfer, or transported directly to slaughter where [sic] *accordance with other applicable law,*

(ii) Federally listed endangered or threatened species may be transferred to AAZPA facilities with written approval of the director,

(iii) Live specimens may be moved to the new primary residence of the possessor with the written approval of the

director, provided all other requirements are satisfied and the total number of locations where animals are held is not increased, and

(f) Escapes of deleterious exotic wildlife are reported immediately to the department.

(5) Retention or disposal of existing specimens lawfully in captivity prior to June 20, 1992: A person holding exotic wildlife specimens in captivity which are classified by the Wildlife Commission as deleterious exotic wildlife by operation of this emergency rule (in the family Bovidae, Reedbucks (all members of the Genus Redunca), Oryx and Gemsbok (all members of the Genus Oryx), Addax (Addax nasomaculatus), Sassabies (all members of the Genus Damaliscus), Hartebeest (Alcelaphus buselaphus), Wildebeests (all members of the Genus Connochaetes), Blackbuck antelope (Antilope cervicapra), Markhor (Capra falconeri), and Marcopolo sheep (Ovis ammon); in the family Cervidae, Fallow deer (Dama dama), Axis deer (Axis axis), rusa deer or Sambar deer (Cervus unicolor, Cervus timorensis, Cervus mariannus and Cervus alfredi), and Sika deer (Cervus Nippon)) may retain the specimens of such deleterious exotic wildlife he/she lawfully possessed prior to June 20, 1992 and the progeny of such animals which were conceived prior to June 20, 1992, provided:

(a) The person reports to the director in writing by July 31, 1992, and annually thereafter, or as otherwise required by the director, the species, number, and location of such specimens,

(b) The specimens are confined to a secure facility and the location reported,

(c) Live specimens are not propagated; and are either neutered, physically separated by sex, and/or rendered infertile by means of contraception,

(d) Live specimens are not released,

(e) Live specimens are not sold or transferred except:

(i) Live specimens in lawful possession prior to June 20, 1992, may be permanently removed from the state of Washington pursuant to sale or gratuitous transfer, or transported directly to slaughter where in accordance with other applicable law,

(ii) Federally listed endangered or threatened species may be transferred to AAZPA facilities with written approval of the director,

(iii) Live specimens may be moved to the new primary residence of the possessor with the written approval of the director, provided all other requirements are satisfied and the total number of locations where animals are held is not increased, and

(f) Escapes of deleterious exotic wildlife are reported immediately to the department.

(6) Escaped Animals: Escaped deleterious exotic wildlife will be considered a public nuisance. The department or any peace officer may seize, capture, or destroy deleterious exotic wildlife that have escaped the possessor's control. The former possessor may be responsible for cost incurred by the department in recovering, maintaining, or disposing of such animals, as well as any damage to the state's wildlife or habitat.

(7) Secure Facility: For the purposes of this rule a "secure facility" is an enclosure so constructed as to prevent

any danger to the environment or wildlife of the state, including escape of the animals contained therein or ingress of or contact with resident wildlife. The adequacy of the facility shall be determined by the director or agents of the director, in their sole discretion.

(8) Persons legally possessing deleterious exotic wildlife must notify the director within ten days of any change of address or location of the holding facility, and any transfer or sale of live specimens in possession allowed hereunder.

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules. The rule published above varies from its predecessor in certain respects not indicated by the use of these markings.

Reviser's note: The spelling error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

Washington State Register, Issue 93-04

WSR 93-04-038
PERMANENT RULES
DEPARTMENT OF WILDLIFE

[Order 581 – Filed January 27, 1993, 2:15 p.m., effective February 13, 1993]

Date of Adoption: January 15, 1993.

Purpose: To identify and designate certain wildlife species and restrict their importation, possession, propagation, sale, transfer and/or release; and to establish (for those species of wildlife lawfully in captivity) requirements to address concerns such as facilities, escape, testing, notification of disease, and reporting.

Citation of Existing Rules Affected by this Order: Amending WAC 232-12-064 Live wildlife.

Statutory Authority for Adoption: RCW 77.12.030.

Pursuant to notice filed as WSR 92-24-092 on December 2, 1992.

Changes Other than Editing from Proposed to Adopted Version: Subsection (13)(f)(i), has been changed from a six-inch to five-inch post requirement in response to pubic opinion that the posts should be allowed to be smaller and the fact that post size varies some throughout the states: subsection (13)(h), has been added to allow a person with a fence existing prior to February 1, 1993, to petition the director for a variance from the new fencing requirements: subsection (14)(a)(ii), the language "Tattoos shall be applied in sequential order," has been deleted. Public input indicates that a farm has one tattoo number

that is applied to all animals: subsection (15), the language "lawfully in captivity" was deleted because the testing requirements also apply to animals not yet imported into the state; and subsection (15)(c), the language "WAC 232-12-017(7)(c)" has been deleted after "specified in" and the language Department of Agriculture WAC 16-54-035 as now or hereafter amended has been inserted. This coincides with the change in WAC 232-12-017.

Other Findings Required by Other Provisions of Law as Precondition to Adoption or Effectiveness of Rule: Amendment to regulation was adopted with a special finding to become effective February 13, 1993. An effective date earlier than 31 days after filing is necessary to prevent a lapse between the current 120-day emergency rule and the effective date of the newly adopted regulation and to continue to protect resident wildlife.

Effective Date of Rule: February 13, 1993.

Curt Smitch
Director
for Dean A. Lydig
Chair

AMENDATORY SECTION (Amending Order 243, filed 4/5/85)

WAC 232-12-064 Live wildlife. Taking from the wild, importation, possession, transfer, holding in captivity.

(1) It is unlawful to take live wild animals, wild birds, or game fish from the wild without a permit provided for by rule of the commission.

(2) Notwithstanding the provisions of WAC 232-12-027(1), WAC 232-12-067 and subsections (3) and (4) herein, it is unlawful to import into the state, hold, possess, propagate, offer for sale, sell, transfer, or release live specimens of wildlife listed in this subsection, their gametes and/or embryo, except as provided under subsections (7), (8), (9) or (10) below:

In the family Cervidae, all of the following species:

Roosevelt and Rocky Mountain elk	Cervus elaphus
Mule deer and Black-tailed deer	Odocoileus hemionus
White-tailed deer	Odocoileus virginianus
Moose	Alces alces
Caribou	Rangifer tarandus caribou

(((~~(2)~~))) (3) It is unlawful to import into the state or to hold live wildlife which were taken, held, possessed or transported contrary to federal or state law, local ordinance or ((~~commission~~)) department rule. Live wild animals, wild birds or game fish shall not be brought into the state without first presenting licensed, accredited veterinarian or fish pathologist certification to the department that the wildlife is disease free and that the area from which acquired has no history of wildlife disease which may pose a risk to wildlife in this state. Proof of lawful importation must be produced for inspection on request of a department employee.

(((~~(3)~~))) (4) It is unlawful to possess or hold in captivity live wild animals, wild birds, or game fish unless lawfully acquired and possessed. Proof of lawful acquisition and possession must be produced for inspection on

request of a department employee. Such proof shall contain: (1) Species; (2) age and sex of animal; (3) origin of animal; (4) name of receiving party; (5) source-name and address; (6) invoice/statement date; and (7) documentation of prior transfers.

~~(((4) Wildlife held in captivity which becomes diseased must immediately be placed under the professional care of a licensed veterinarian or certified fish pathologist, and such incident reported immediately to the department by the owner. If diseased wildlife present a threat to the wildlife of the state, the director may order such actions as necessary, including quarantine or destruction of stock, sterilization of enclosures and facilities, cessation of activities and disposal of the wildlife in a manner satisfactory to the department.~~))

(5) Live wild animals, wild birds or game fish held in captivity or their progeny or parts thereof may not be sold or otherwise commercialized on except as provided by rule of the commission.

(6) No wildlife shall be released from captivity except as provided in WAC 232-12-271, except that it is lawful to return to the waters from which caught, game fish caught and subsequently kept alive on stringers, in live wells or other containers while fishing. The release of fish into any waters of the state, including private, natural or man-made ponds requires a fish planting permit.

~~(((7) All live wildlife possessed or held in captivity, and the area where held, must be open to inspection by department personnel at reasonable times.~~))

(7) Scientific Research or Display: The director may authorize, by written approval, a person to import into the state, hold, possess and propagate live specimens of wildlife listed in subsection (2) for scientific research or for display by zoos or aquariums who are accredited institutional members of the American Association of Zoological Parks and Aquariums (AAZPA) provided:

(a) The specimens are confined to a secure facility.

(b) The specimens will not be transferred to any other location within the state, except to other AAZPA accredited facilities and transported by AAZPA accredited institutional members or their authorized agents with written approval of the director or as otherwise authorized in writing by the director.

(c) The specimens will not be sold or otherwise disposed of within the state without written approval of the director.

(d) The person will keep such records on the specimens and make such reports as the director may require, and

(e) The person complies with the other requirements of this section.

(8) Retention or Disposal of Existing Specimens lawfully in captivity prior to June 20, 1992: A person holding live specimens of wildlife listed in subsection (2) by operation of emergency rule filed June 19, 1992 [in the family Cervidae, all of the following species: Roosevelt and Rocky Mountain elk (Cervus elaphus); Mule Deer and Black-tailed deer (Odocoileus hemionus); White-tailed deer (Odocoileus virginianus); and Moose (Alces

alces)] may retain the specimens of such wildlife such person lawfully possessed prior to June 20, 1992 and the lawful progeny thereof provided such person complies with subsections (8)(a) through (8)(f) hereunder and the other requirements of this section.

(a) The person reported to the director in writing the species, number and location of the specimens as required.

(b) The specimens are confined to a secure facility at the location reported.

(c) Live specimens are not propagated except at AAZPA accredited facilities with the written permission of the director or as otherwise authorized in writing by the director.

(d) Live specimens are not released, except with written permission of the director.

(e) Live specimens are not sold or transferred except:

(i) Live specimens in lawful possession prior to June 20, 1992 and lawful progeny may be permanently removed from the state of Washington or transported directly to slaughter where in accordance with other applicable law,

(ii) Federally listed endangered or threatened species may be transferred to AAZPA accredited facilities where in compliance with federal law,

(iii) Live specimens may be moved to the new primary residence of the possessor with the written approval of the director, provided all other requirements

of this section are satisfied and the total number of locations where animals are held is not increased,

(iv) AAZPA facilities may sell and/or transfer live specimens within the state with the written permission of the director.

(f) Live specimens shall be neutered, physically separated by sex, and/or rendered infertile by means of contraception, except at AAZPA accredited facilities with the written permission of the director.

(9) Retention or disposal of existing specimens lawfully in captivity prior to February 13, 1993: A person holding live specimens of wildlife newly listed in subsection (2) by operation of this rule [Caribou (Rangifer tarandus caribou)], may retain the specimens of such wildlife the person lawfully possessed prior to February 13, 1993, provided:

(a) The person reports to the director in writing by March 31, 1993, and reports annually thereafter, or as otherwise required by the director, the species, number, and location of such specimens.

(b) The person complies with subsections (8)(b) through (8)(f) herein and the other requirements of this section.

(10) The provisions of this section shall not prohibit the importation, possession, propagation, sale, transfer, or release of live specimens of federally listed threatened or endangered species, their gametes and/or embryo, where in compliance with federal law.

(11) Escaped Wildlife:

(a) Escaped wildlife will be considered a public nuisance. The department or any peace officer may seize, capture, or destroy wildlife that have escaped the possessor's control. The former possessor shall be responsible for costs incurred by the department in recovering, maintaining, or disposing of such animals, as well as any damage to the state's wildlife or habitat.

(b) Escapes of wildlife must be reported immediately to the department.

(c) The recapture or death of escaped wildlife must be reported immediately to the department.

(12) Secure Facility:

(a) All captive wildlife will be held in a secure facility. For the purpose of this rule, a secure facility is an enclosure so constructed as to prevent danger to the environment or wildlife of the state, including escape of live wildlife specimens in captivity or ingress of resident wildlife ungulates (hoofed animals).

(b) For wildlife listed in subsection (2), the secure facility must comply with the fencing requirements in subsection (13) herein.

(13) Fencing requirements

(a) Perimeter fences must be, at a minimum, eight feet above ground level for their entire length. The bottom six feet must be mesh of sufficient size to prevent resident wildlife ungulates (hoofed animals) from entering and captive wildlife from escaping. Supplemental wire required to attain a height of eight feet may be smooth, barbed, or woven wire (at least 12½ gauge) with strands spaced not more than six inches apart.

(b) Perimeter fences constructed of high tensile wire must be supported by a post or stay at minimum intervals of eight feet.

(c) Perimeter fences must be at least 12½ gauge woven wire, 14½ gauge high-tensile woven wire, chain link, non-climbable woven fence, or other fence approved by the director.

(i) If the wire used is not a full eight feet in height, it must be overlapped one row and securely fastened at every other vertical row or woven together with cable.

(d) Electric fencing materials may be used on perimeter fences only as a supplement to conventional fencing materials.

(e) All gates in the perimeter fences must be self-closing, equipped with two locking devices, and installed only in locations that have been approved by the director. Double gates may be required at points in the perimeter fences subject to frequent vehicle traffic that is not related to activities involving the holding of captive wildlife.

(f) Posts used in the perimeter fences must be:

(i) Wood (pressure treated), five-inch minimum diameter or an equivalent as approved by the director;

(ii) Spaced no more than twenty-four feet apart with stays or supports at eight foot intervals between the posts;

(iii) Extended at lease eight feet above ground level;

(iv) Corners braced with wood or with an equivalent material as approved by the director.

(g) Fences must be maintained at all times to prevent captive wildlife from escaping or resident wildlife ungulates (hoofed animals) from entering the enclosure. If such animals do pass through, under, or over the fence because of any topographic feature or other conditions, the person possessing wildlife must immediately supplement the fence to prevent continued passage.

(h) For any fence existing prior to February 13, 1993, a person may petition the director in writing for a variance from the above fencing requirements. Any such petition must be filed no later than May 31, 1993 and must identify all aspects in which the existing fence does not meet the fencing requirements contained herein. On approval of the director, such person may maintain such existing fence with normal repair. However, any extension or relocation of existing fence must meet the fencing requirements contained herein.

(14) Marking Requirements

(a) All live specimens of wildlife identified in subsection (2) must be individually identified by the methods specified below:

(i) All live specimens of such wildlife shall be marked with USDA official ear tags or with ear tags supplied or approved by the department. Tags shall be applied in sequential order, and

(ii) All live specimens of such wildlife shall be marked with a tattoo with an identifying number that has been recorded with the director. The tattoo must be placed on the left ear of the animal.

(b) Identification assigned to an individual animal may not be transferred to any other animal.

(c) Where allowed, all lawful progeny of wildlife identified in subsection (2) must be tagged and tattooed by December 31 of the year of birth or upon leaving the holding facility, whichever is earlier.

(d) Where allowed, if wildlife identified in subsection (2) is sold or transferred within the state, the tag and tattoo must accompany the animal. The new owner or possessor shall not renumber the animal.

(e) Where allowed, live specimens of wildlife identified in subsection (2) shall be marked prior to importation.

(f) No unmarked wildlife identified in subsection (2) may be sold or otherwise transferred from the holding facility.

(15) Testing of specimens.

(a) Where allowed, prior to entry into the state of Washington, persons importing any member of the Genus Cervus which is identified in subsection (2) herein, must submit records of genetic tests, conducted by a professionally recognized laboratory to identify red deer genetic influence (genetic material from any member of any subspecies, race, or species of the elk-red deer-wapiti complex Cervus elaphus not indigenous to the state of Washington. Such testing shall be at the possessor's expense. Animals which are deemed by Department of Wildlife biologists upon examination to exhibit either: behavioral (vocalization), morphological (size, rump patch, color) or biochemical indications of such influence

(hemoglobin, superoxide dismutase, transferrin and post-transferrin, or others to be developed) may not be imported.

(b) A person currently holding any member of the genus Cervus elaphus identified in subsection (2) herein must submit records of genetic tests, conducted by a professionally recognized laboratory to identify red deer genetic influence (genetic material from any member of any subspecies, race, or species of the elk-red deer-wapiti complex Cervus elaphus not indigenous to the state of Washington), for each individual cervid to the director within 90 days of passage of this rule. Such testing shall be at the possessor's expense. Any animals identified as red deer or having non-indigenous genetic influence must be destroyed, removed from the state, or neutered within 180 days of passage of this rule.

(c) The director may require that specimens listed in subsection (2) lawfully in captivity be tested for brucellosis (brucella abortus), tuberculosis (mycobacterium bovis and mycobacterium tuberculosis), meningeal worm (Paralophostrongylus tenuis), and muscle worm (Elaphostrongylus cervis) in accordance with the procedures specified in Department of Agriculture WAC 16-54-035 as now or hereafter amended, and/or for other diseases or parasites determined to pose a risk to wildlife. The results of such tests shall be filed with the director as required.

(16) Reporting

(a) A person holding wildlife listed in subsection (2) in captivity shall submit a completed report no later than March 30, 1993 and then no later than January 31 of each

year, or as otherwise required by the director, on a form provided by the department.

(b) Persons possessing wildlife listed in subsection (2) must notify the director within ten days of any change of such persons' address and/or location of the holding facility.

(17) Inspection

(a) All holding facilities for captive wildlife located in the state are subject to inspection for compliance with the provisions of this section.

(b) Such inspections may take place without warrant or prior notice but shall be conducted at reasonable times and locations.

(18) Notification and disposition of diseased animals.

(a) Any person who has reason to believe that wildlife being held pursuant to this rule have or have been exposed to a dangerous or communicable disease or parasite shall notify the department immediately.

(b) Upon having reason to believe that wildlife held pursuant to this rule have been exposed to or contracted a dangerous or contagious disease or parasite, the director may order inspection of such animals by a licensed, accredited veterinarian, certified fish pathologist, or inspection agent. Inspection shall be at the expense of the possessor.

(c) The director shall determine when destruction of wildlife, quarantine, disinfection, or sterilization of facilities is required at any facility holding wildlife pursuant to

this rule. If the director determines that destruction of wildlife, quarantine, disinfection, or sterilization of facilities is required, a written order shall be issued to the possessor describing the procedure to be followed and the time period for carrying out such actions. Such activities shall be at the expense of the possessor.

(19) Quarantine Area

(a) Any facility holding wildlife listed in subsection (2) must have an approved quarantine facility within its exterior boundary or submit an action plan to the director that guarantees access to an approved quarantine facility within the state of Washington.

(i) An approved quarantine facility is one that meets criteria set by the Washington State Department of Agriculture.

(ii) The quarantine area must meet the test of isolation, separate feed and water, escape security, and allowances for the humane holding and care of its occupants for extended periods of time.

(b) Should the imposition of a quarantine become necessary, the possessor of any wildlife must provide an on-site quarantine facility or make arrangements at such possessor's expense to transport such wildlife to an approved quarantine facility.

(20) Seizure

(a) The Department of Wildlife may seize any unlawfully possessed wildlife.

(b) The cost of any seizure and/or holding of wildlife may be charged to the possessor of such animals.

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

WSR 93-04-039
PERMANENT RULES
DEPARTMENT OF WILDLIFE

[Order 582 – Filed January 27, 1993, 2:19 p.m., effective February 13, 1993]

Date of Adoption: January 15, 1993.

Purpose: To provide protection to wildlife and the environment of the state by identifying and designating certain species of exotic wild animals as deleterious exotic wildlife and prohibiting or restricting their importation, possession, propagation, sale, transfer and/or release; and establishing (for those deleterious exotic wildlife species lawfully in captivity) mandatory protective measure such as facilities, escape, testing, notification of disease, and reporting.

Citation of existing Rules Affected by this Order: Amending WAC 232-12-017 Deleterious exotic wildlife.

Statutory Authority for Adoption: RCW 77.12.020 and 77.12.040.

Pursuant to notice filed as WSR 92-24-090 on December 2, 1992.

Changes Other than Editing from Proposed to Adopted Version: 1. In subsection (1)(d)(iv), the following species were removed from the proposed list of deleterious exotic species: Redunca (Reedbucks); Oryx (Oryx

and Gemsbok); Addax nasomaculatus (addax); Antilope cervicapra (Blackbuck antelope). The initial risk assessment of these species which were proposed as deleterious exotic wildlife included concerns about disease introduction and habitat competition with native wildlife. Reassessment of the risks throughout this process indicates that permanent WAC 16-54-035 adopted by the Department of Agriculture in October 1992 establishes mandatory health and disease testing for all animals prior to importation. That change reduces our concern about disease introduction. Wildlife managers continue to believe that these species could compete with native wildlife for habitat and forage for several months in spring and summer if they escape but the risk is not as great as with some other species. These species could survive in Washington for much of the year but their ability to survive and prosper in winter climates is doubtful. For these reasons, these species were removed from the list of proposed deleterious exotic wildlife.

2. In subsection (4)(b), the language the [sic] following has been inserted after the work [sic] "holding" to reflect only those species that were permanently classified as deleterious exotic wildlife and not all of the species that were classified as deleterious exotic wildlife by the Wildlife Commission by operation of emergency rule filed June 19, 1992. The same species referenced in item number 1 of this document have been deleted from this subsection.

3. Subsection (7), the language and reindeer (all members of Genus Rangifer, except Rangifer tarandus caribou) has been inserted after "(Dama dama)". This

allows reindeer to be imported into the state, held, possessed, propagated, offered for sale, sold, and/or transferred under the requirements of this rule except in those areas of the state described in new subsection (7)(e). Recently adopted Department of Agriculture WAC 16-54-035 concerning health certification and testing of animals prior to importation into the state has reduced our concerns about disease transmission to native wildlife. Reindeer can interbreed with resident caribou which is an endangered species. To protect the resident caribou from hybridization, reindeer are prohibited in those areas of the state identified in new subsection (7)(e). See item number 5 in this document.

4. Subsection (7)(b) and (c) as proposed have been deleted, except for (7)(c)(iii)(A) which has been retained and identified as (7)(b)(i). New subsection (7)(b) language has been added as follows: The person complies with Department of Agriculture WAC 16-54-035 as now or hereafter amended except; These changes remove the requirement for health certification and disease testing prior to importation because this is now required by the Department of Agriculture per October 1992 amendments to WAC 16-54-035. New subsection (7)(b)(i) is retained because it is not yet included in Department of Agriculture WAC 16-54-035 and is important in preventing introduction of the meningeal worm parasite to native wildlife.

5. Proposed subsection (7)(e) has been renumbered as subsection (7)(d) and (e) now states Reindeer may not be imported into, held, or possessed in Ferry, Stevens, or Pend Oreille counties or that portion of Spokane County north of Spokane River. Reindeer are banned in this area

of the state to prevent reindeer from interbreeding with resident caribou which are an endangered species.

6. Subsection (8)(a), the language and reindeer (all members of Genus Rangifer, except Rangifer tarandus caribou) has been inserted after "(Dama dama)" as it was done in subsection (7). See item number 3 of this document.

7. Subsection (10)(f)(i) has been changed form [sic] a six-inch to five-inch post requirement in response to public opinion that the posts should be allowed to be smaller and the fact that post size varies some throughout the states.

8. Subsection (10)(h) has been added to allow a person with a fence existing prior to February 1, 1993, to petition the director for a variance from the new fencing requirements.

9. Subsection (11)(c)(ii), the language "Tattoos shall be applied in sequential order," has been deleted. Public input indicates that a farm has one tattoo number that is applies to all animals.

10. Subsection (12), the language "lawfully in captivity" was deleted because the testing requirements also apply to animals not yet imported in to the state.

11. Subsection (12)(c), the language "subsection (7)(c)" has been deleted after "specified in" and the language Department of Agriculture WAC 16-54-035 as now or hereafter amended has been inserted. This coincides with the removal of original subsection (7)(b) and (c) as explained in item number 4 of this document.

12. Editing revisions have been made throughout the document so the identifying numbers and letters are in logical order.

Other Findings Required by Other Provisions of Law as Precondition to Adoption or Effectiveness of Rule: Amendment to regulation was adopted with a special finding to become effective February 13, 1993. An effective date earlier than 31 days after filing is necessary to prevent a lapse between the current 120-day emergency rule and the effective date of the newly adopted regulation and to continue to protect resident wildlife.

Effective Date of Rule: February 13, 1993.

Curt Smitch
Director
for Dean A. Lydig
Chair

AMENDATORY SECTION (Amending Order 482, filed 1/17/91)

WAC 232-12-017 Deleterious exotic wildlife. ((~~Deleterious exotic wildlife includes:~~))

(1)((~~Fish~~)) The following animals are hereby designated as deleterious exotic wildlife:

(a) Fish

((~~(a)~~)) (i) In the family Claridae, (walking catfish) all members of the family.

((~~(b)~~)) (ii) In the family ((~~Chprinidae~~)) Cyprinidae, (diploid grass carp,) *Ctenopharyngodon idella*

((~~(c)~~)) (iii) In the family Amiidae, (bowfin, mudfish or grinnel) Amia calva

((~~(d)~~)) (iv) In the family Characidae, the piranha (also pirameba, caribe, pira, piraya, chupita, rodoleira, palometa), all species of the genera Serrasalmus, Rooseveltiella and Pygocentrus

((~~(e)~~)) (v) In the family Cyprindae, the rudd (Scardinius erythropthalmus) and Ide (silver orfe or golden orfe (Leuciscus idus))

((~~(f)~~)) (vi) In the family Lepiosteidae, the gar-pikes

((~~(g)~~)) (vii) In the family Channidae, the snakeheads (China fish) and all forms of the genus Channa (Ophicephalus)

((~~(2)~~)) (b) Amphibians

((~~(a)~~)) (i) In the family Pipdae, the African clawed frog (*Xenopus Laevis*)

((~~(3)~~)) (c) Birds

((~~(a)~~)) (i) In the family Anatidae, the mute swan (Cygnus olor)

((~~(4)~~)) (d) Mammals

((~~(a)~~)) (i) In the family Viverridae, the mongoose (all members of the genus Herpestes)

((~~(b)~~)) (ii) In the family Suidae, the wild boar, (*Sus-scrofa* and all wild hybrids)

((~~(c)~~)) (iii) In the family Tayassuidae, the collared peccary (javelina) (*Tayassu tajacu*)

((~~(d)~~)) (iv) In the family Bovidae, all members and hybrids of the following genera ((-)): Rupicapra (Chamois); Hemitragus (Tahr); Capra (goats, ibexes

except domestic goat capra (hircus); Ammotragus (Barbary sheep or Aou-dad); ((~~and~~)) Ovis (((~~only mouflon species Ovis musimon~~))) (sheep), except domestic sheep Ovis aries; Damaliscus (Sassabies); Alcelaphus buselaphus (Hartebeest); Connochaetes (Wildebeests).

(((~~e~~))) (v) In the family Cervidae, the european red deer (Cervus elaphus elaphus), all nonnative subspecies of Cervus elaphus, and all hybrids with North american elk; Fallow deer (Dama dama), Axis deer (Axix axis), Rusa deer or Sambar deer (Cervus unicolor, Cervus timorensis, Cervus mariannus and Cervus alfredi), Sika deer (Cervus Nippon), Reindeer (all members of the Genus Rangifer except Rangifer tarandus caribou), and Roedeer (all members of the Genus Capreolus).

(((~~5~~))) (2) It is unlawful to import into the state, hold, possess, propagate, offer for sale, sell, transfer, or release live specimens of deleterious exotic wildlife, their gametes and/or embryo, except as provided under (((~~6~~))) (3), (4), ~~or~~ (((~~7~~))) (5), (6), or (7) below.

(((~~6~~))) (3) Scientific research or display: The director may authorize, by written approval, a person to import into the state, hold, ((~~or~~)) possess, and propagate live specimens of deleterious exotic wildlife for scientific research or for display by zoos or aquariums who are accredited institutional members of the American Association of Zoological Parks and Aquariums (AAZPA) provided:

(a) The specimens are confined to a secure facility,

(b) The specimens will not be transferred to any other location within the state, except to ((~~and by~~)) other

AAZPA accredited facilities with written director approval or as otherwise authorized in writing by the director.

(c) The specimens will be euthanized and all parts incinerated at the end of the project, except federally listed endangered or threatened species may be retained or transferred ((~~to AAZPA facilities with written director approval~~)) where in compliance with federal law, ((~~and~~))

(d) The person will keep such records on the specimens and make such reports as the director may require, and

(e) The person complies with other requirements of this section.

(((~~7~~))) (4) Retention or disposal of existing specimens lawfully in captivity:

(a) Specimens lawfully in captivity prior to January 18, 1991: A person holding exotic wildlife specimens in captivity which ((~~are~~)) were classified by the Wildlife Commission as deleterious exotic wildlife on or before January 18, 1991 may retain the specimens of such deleterious exotic wildlife ((~~he/she~~)) such person lawfully ((~~possesses~~)) possessed prior to January 18, 1991 provided such person complies with subsections (4)(c) through (4)(h) hereunder and other requirements of this section:

(b) Specimens lawfully in captivity prior to June 20, 1992: A person holding the following deleterious exotic wildlife specimens in captivity which were classified by the Wildlife Commission as deleterious exotic wildlife by operation of emergency rule filed June 19, 1992 (in the

family Bovidae, Sassabies (all member of the Genus Damaliscus), Hartebeest (Alcelaphus buselaphus), Wildebeests (all members of the Genus Connochaetes), Markhor (Capra Falconeri), and Marcopolo sheep (Ovis ammon); in the family Cervidae, Fallow deer (Dama dama), Axis deer (Axix axis), Sika deer (Cervus Nippon), Rusa deer or Sambar deer (Cervus unicolor, Cervus Timorensis, Cervus manannus and Cervus alfredi), may retain the specimens of such deleterious exotic wildlife such person lawfully possessed prior to June 20, 1992, and the lawful progeny thereof provided such person complies with subsections (4)(c) through (4)(h) hereunder and the other requirements of this section and except as provided under subsection (7).

(((~~(a)~~))) (c) The person ((~~reports~~)) reported to the director in writing ((~~by March 18, 1991~~)) the species, number and location of the specimens as required.

(((~~(b)~~))) (d) The specimens are confined to a secure facility at the location reported, ((~~and~~))

(((~~(c)~~))) (e) Live specimens are not propagated, except at AAZPA accredited facilities with the written permission of the director or as otherwise authorized in writing by the director, ((~~,sold, transferred, or released, except for transfer or sale to locations outside the state of Washington, except federally listed endangered or threatened species may be transferred to AAZPA facilities with written director approval.~~))

(f) Live specimens shall be neutered, physically separated by sex, and/or rendered infertile by means of contraception, except at AAZPA accredited facilities with the written permission of the director,

(g) Live specimens are not released,

(h) Live specimens are not sold or transferred except:

(i) Live specimens in lawful possession may be permanently removed from the state of Washington or transported directly to slaughter where in accordance with other applicable law,

(ii) Federally listed endangered or threatened species may be transferred to AAZPA accredited facilities where in compliance with federal law,

(iii) Live specimens may be moved to the new primary residence of the possessor with the written approval of the director, provided all other requirements are satisfied and the total number of locations where animals are held is not increased,

(iv) AAZPA facilities may sell and/or transfer live specimens within the state with the written permission of the director.

(5) Retention or disposal of existing specimens lawfully in captivity prior to February, 13, 1993: A person holding exotic wildlife specimens in captivity which are newly classified by the Wildlife Commission as deleterious exotic wildlife by operation of this rule [Reindeer (all members of the Genus Rangifer, except Rangifer tarandus caribou), and Roedeer (all members of the Genus Capreolus)], may retain the specimens of such deleterious exotic wildlife such person lawfully possessed prior to February 13, 1993, provided:

(a) The person reports to the director in writing by March 31, 1993, and reports annually thereafter, or as

otherwise required by the director, the species, number, and location of such specimens,

(b) The person complies with subsections (4)(d) through (4)(h) herein and the other requirements of this section.

(6) The provisions of this section shall not prohibit the importation, possession, propagation, sale, transfer, or release of live specimens of federally listed threatened or endangered species, their gametes and/or embryo, where in compliance with federal law.

(7) Notwithstanding the provisions of subsection (2), Fallow deer (Dama dama) and reindeer (all members of the Genus Rangifer, except Rangifer tarandus caribou) may be imported into the state, held, possessed, propaged, offered for sale, sold, and/or transferred provided:

(a) The person complies with subsection (4)(c) through (4)(g) hereunder and the other requirements of this section, except for subsections (4)(e), (4)(f), and (4)(h), and

(b) The person complies with Department of agriculture WAC 16-54-035 as now or hereafter amended except:

(i) Animals which have resided at any time east of a line drawn through the eastern boundaries of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and the 100th Meridian where it passes through Texas or have had contact with or shared common ground with animals which have resided at any time east of such line shall not be imported into the state of Washington, unless specifically authorized in writing by the directors of the

Department of Agriculture and the Department of Wildlife.

(c) No specimens affected with any infectious or communicable disease shall be imported into the state unless in compliance with all applicable laws and regulations and unless written permission is obtained from the directors of the Department of Agriculture and the Department of Wildlife.

(d) The specimens are confined to a secure facility.

(e) Reindeer may not be imported into, held, or possessed in Ferry, Stevens, or Pend Oreille counties or that portion of Spokane County north of Spokane River.

(8) Escaped Animals

(a) Escaped deleterious exotic wildlife; including Fallow deer (dama dama), and Reindeer (all members of the Genus Rangifer, except Rangifer tarandus caribou) will be considered a public nuisance. The department or any peace officer may seize, capture, or destroy deleterious exotic wildlife that have escaped the possessor's control. The former possessor shall be responsible for costs incurred by the department in recovering, maintaining, or disposing of such animals, as well as any damage to the state's wildlife or habitat.

(b) Escapes of deleterious exotic wildlife must be reported immediately to the department.

(c) The recapture or death of escaped deleterious exotic wildlife must be reported immediately to the department.

(9) Secure facility

(a) All deleterious exotic wildlife will be held in a secure facility. For the purpose of this rule, a secure facility is an enclosure so constructed as to prevent danger to the environment or wildlife of the state, including escape of deleterious exotic wildlife specimens or ingress of resident wildlife ungulates (hoofed animals). The adequacy of the facility shall be determined by the director or agents of the director.

(b) For deleterious exotic wildlife listed in subsections (1)(d) (iv) and (1)(d)(v), the "secure facility" must comply with the fencing requirements in subsection (10) unless otherwise authorized by the director in writing.

(10) Fencing requirements

(a) Perimeter fences must be, at a minimum, eight feet above ground level for their entire length. The bottom six feet must be mesh of sufficient size to prevent resident wildlife ungulates (hoofed animals) from entering and deleterious exotic wildlife from escaping. Supplemental wire required to attain a height of eight feet may be smooth, barbed, or woven wire (at least 12-1/2 gauge) with strands spaced not more than six inches apart.

(b) Perimeter fences constructed of high tensile wire must be supported by a post or stay at minimum intervals of eight feet.

(c) Perimeter fences must be at least 12-1/2 gauge woven wire, 14-1/2 gauge high-tensile woven wire, chain link, non-climbable woven fence, or other fence approved by the director.

(i) If the wire used is not a full eight feet in height, it must be overlapped one row and securely fastened at every other vertical row or woven together with cable.

(d) Electric fencing materials may be used on permeter fences only as a supplement to conventional fencing materials.

(e) All gates in the perimeter fences must be self-closing, equipped with two locking devices, and installed only in locations that have been approved by the director. Double gates may be required at points in the perimeter fences subject to frequent vehicle traffic that is not related to activities involving the holding of deleterious exotic wildlife.

(f) Posts used in the perimeter fences must be:

(i) Wood (pressure treated), five-inch minimum diameter or an equivalent as approved by the director;

(ii) Spaced no more than twenty-four feet apart with stays or supports at eight foot intervals between the posts;

(iii) Extended at least eight feet above ground level;

(iv) Corners braced with wood or with an equivalent material as approved by the director.

(g) Fences must be maintained at all times to prevent deleterious exotic wildlife from escaping or resident wildlife ungulates (hoofed animals) from entering the enclosure. If such animals do pass through, under, or over the fence because of any topographic feature or other conditions, the person possessing deleterious exotic

wildlife must immediately supplement the fence to prevent continued passage.

(h) For any fence existing prior to February 13, 1993, a person may petition the director in writing for a variance from the above fencing requirements. Any such petition must be filed no later than May 31, 1993 and must identify all aspects in which the existing fence does not meet the fencing requirements contained herein. On approval of the director, such person may maintain such existing fence with normal repair. However, any extension or relocation of existing fence must meet the fencing requirements contained herein.

(11) Marking Requirements

(a) All live specimens of deleterious exotic wildlife except those listed in subsections (1)(a) and (1)(b), shall be permanently and individually identified by methods approved by the director,

(b) Identification assigned to an individual animal may not be transferred to any other animal.

(c) All specimens of deleterious exotic wildlife identified in subsections (1)(d)(iv) and (1)(d)(v) must be individually identified by the methods specified below.

(i) All live specimens of such deleterious exotic wildlife shall be marked with USDA Official ear tags or with ear tags supplied or approved by the department. Tags shall be applied in sequential order, and

(ii) All live specimens of such deleterious exotic wildlife shall be marked with a tattoo with an identifying number that has been recorded with the director. The tattoo must be placed on the left ear of the animal.

(d) All lawful progeny of deleterious exotic wildlife must be tagged and tattooed by December 31 of the year of birth or upon leaving the holding facility, whichever is earlier.

(e) Where allowed, if an animal is sold or transferred within the state, the tag and tattoo must accompany the animal. The new owner or possessor shall not renumber the animal.

(f) Where allowed, live specimens of deleterious exotic wildlife shall be marked prior to importation.

(g) No unmarked deleterious exotic wildlife may be sold or otherwise transferred from the holding facility.

(12) Testing of specimens

(a) Where allowed, prior to entry into the state of Washington, a person importing any member of the Genus Cervus which is identified in subsection (1)(v) herein must submit records of genetic tests, conducted by a professionally recognized laboratory to identify red deer genetic influence (genetic material from any member of any subspecies, race, or species of the elk-red deer-wapiti complex Cervus elaphus not indigenous to the state of Washington). Such testing shall be at the possessor's expense. Animals which are deemed by Department of Wildlife biologists upon examination to exhibit either: behavorial (vocalization), morphological (size, rump patch, color) or biochemical indications of such influence (hemoglobin, superoxide dismutase, transferrin and post-transferrin, or others to be developed) may not be imported.

(b) The director may require a person currently possessing any member of the Genus Cervus which are identified in subsection (1)(v) herein to submit records of genetic tests, conducted by a professionally recognized laboratory to identify red deer genetic influence (genetic material from any member of any subspecies, race, or species of the elk-red deer-wapiti complex Cervus elaphus not indigenous to the state of Washington), for each individual cervied to the department. Such testing shall be at the possesor's expense. The director may require that any animal identified a red deer or having non-indigenous genetic influence be destroyed, removed from the state, or neutered.

(c) The director may require that all specimens of deleterious exotic wildlife lawfully in captivity be tested for brucellosis (brucella abortus), tuberculosis (mycobacterium bovis and mycobaterium tuberculosis), meningeal worm (Paralophostrongylus tenuis), and muscle worm (Elaphostrongylus cervis) in accordance with the procedures specified in Department of Agriculture WAC 16-54-035 as now or hereafter amended and/or for other disease or parasites determined to pose a risk to wildlife. The results of such tests shall be filed with the director as required.

(13) Reporting

(a) A person holding deleterious exotic wildlife in captivity shall submit a completed report no later than March 30, 1993 and then no later than January 31 of each year, or as otherwise required by the director, on a form provided by the department.

(b) Persons possessing deleterious exotic wildlife must notify the director within ten days of any change of such persons' address and/or location of the holding facility.

(14) Inspection

(a) All holding facilities for deleterious exotic wildlife located in the state are subject to inspection for compliance with the provisions of this section.

(b) Such inspections may take place without warrant or prior notice but shall be conducted at reasonable times and locations.

(15) Notification and disposition of diseased animals.

(a) Any person who has reason to believe that deleterious exotic wildlife being held pursuant to this rule have or have been exposed to a dangerous or communicable disease or parasite shall notify the department immediately.

(b) Upon having reason to believe that deleterious exotic wildlife held pursuant to this rule have been exposed to or contracted a dangerous or contagious disease or parasite, the director may order inspection of such animals by a licensed, accredited veterinarian or inspection agent. Inspection shall be at the expense of the possessor.

(c) The director shall determine when destruction of animals, quarantine, or disinfection is required at any facility holding deleterious exotic wildlife pursuant to this rule. If the director determines that destruction, quarantine, or disinfection is required, a written order shall be

issued to the possessor describing the procedure to be followed and the time period for carrying out such actions. Such activities shall be at the expense of the possessor.

(16) Quarantine Area

(a) Any facility holding deleterious exotic wildlife must have an approved quarantine facility within its exterior boundary or submit an action plan to the director that guarantees access to an approved quarantine facility within the state of Washington.

(i) An approved quarantine facility is one that meets criteria set by the Washington State Department of Agriculture.

(ii) The quarantine area must meet the tests of isolation, separate feed and water, escape security, and allowances for the humane holding and care of its occupants for extended periods of time.

(b) Should the imposition of a quarantine become necessary, the possessor must provide an on-site quarantine facility or make arrangements at such possessor's expense to transport the animals to the approved quarantine facility named in the quarantine action plan.

(17) Seizure

(a) The Department of Wildlife may seize any unlawfully possessed deleterious exotic wildlife.

(b) The cost of any seizure and/or holding of deleterious exotic wildlife may be charged to the possessor of such animals.

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules. The rule published above varies from its predecessor in certain respects not indicated by the use of these markings.

Reviser's note: The spelling error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

Reviser's note: The typographical errors in the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

WSR 93-04-040

PERMANENT RULES
DEPARTMENT OF WILDLIFE

[Order 583 – Filed January 27, 1993, 2:21 p.m., effective February 13, 1993]

Date of Adoption: January 15, 1993.

Purpose: To protect resident wildlife by clarifying that this rule refers to importation and retention of dead wildlife and to distinguish it from WAC 232-12-064 regulating importation and retention of live wildlife.

Citation of Existing Rules Affected by this Order: Amending WAC 232-12-021 Importation and retention of dead nonresident wildlife.

Statutory Authority for Adoption: RCW 77.12.030.

Pursuant to notice filed as WSR 92-24-091 on December 2, 1992.

Other Findings Required by Other Provisions of Law as Precondition to Adoption or Effectiveness of Rule: Amendment to regulation was adopted with a special finding to become effective February 13, 1993. An effective date earlier than 31 days after filing is necessary to prevent lapse between the current 120-day emergency rule and the effective date of the newly adopted regulation and to continue to protect resident wildlife.

Effective Date of Rule: February 13, 1993.

Curt Smitch
Director
for Dean A. Lydig
Chair

AMENDATORY SECTION (Amending Order 177, filed 1/28/82)

WAC 232-12-021 ((~~Import~~)) Importation and retention of dead nonresident wildlife. It is unlawful:

(1) To import or possess dead wildlife, taken in another state or country, into Washington unless ((~~the~~)) such wildlife was acquired lawfully. Proof of legal acquisition must be retained during the period of retention of the carcass or edible parts.

(2) For a person who imports a dead mountain sheep, mountain goat, cougar or bear to fail to report such importation to the department in writing within ten days of the importation. The report must contain the name and address of the importer, the location where the dead wildlife is being ((~~held~~)) stored and general information describing where and how the wildlife was obtained.

Title 232 WAC: Wildlife, Department of

WAC 232-12-064 Live wildlife. Taking from the wild, importation, possession, holding in captivity.

(1) It is unlawful to take live wild animals, wild birds, or game fish from the wild without a permit provided for by rule of the commission.

(2) It is unlawful to import into the state or to hold live wildlife which were taken, held, possessed or transported contrary to federal or state law, local ordinance or commission rule. Live wild animals, wild birds or game fish shall not be brought into the state without first presenting veterinarian or fish pathologist certification to the department that the wildlife is disease free and that the area from which acquired has no history of wildlife disease which may pose a risk to wildlife in this state. Proof of lawful importation must be produced for inspection on request of a department employee.

(3) It is unlawful to possess or hold in captivity live wild animals, wild birds, or game fish unless lawfully acquired. Proof of lawful acquisition must be produced for inspection on request of a department employee. Such proof shall contain: (1) Species; (2) age and sex of animal; (3) origin of animal; (4) name of receiving party; (5) source-name and address; (6) invoice/statement date; and (7) documentation of prior transfers.

(4) Wildlife held in captivity which becomes diseased must immediately be placed under the professional care of a licensed veterinarian or certified fish pathologist, and such incident reported immediately to the department by the owner. If diseased wildlife present a

threat to the wildlife of the state, the director may order such actions as necessary, including quarantine or destruction of stock, sterilization of enclosures and facilities, cessation of activities and disposal of the wildlife in a manner satisfactory to the department.

(5) Live wild animals, wild birds or game fish held in captivity or their progeny or parts thereof may not be sold or otherwise commercialized on except as provided by rule of the commission.

(6) No wildlife shall be released from captivity except as provided in WAC 232-12-271, except that it is lawful to return to the waters from which caught, game fish caught and subsequently kept alive on stringers, in live wells or other containers while fishing. The release of fish into any waters of the state, including private, natural or man-made ponds requires a fish planting permit.

(7) All live wildlife possessed or held in captivity, and the area where held, must be open to inspection by department personnel at reasonable times.

[Statutory Authority: RCW 77.16.040, 85-09-008 (Order 243), § 232-12-064, filed 4/5/85; 84-09-052 (Order 224), § 232-12-064, filed 4/16/84. Statutory Authority: RCW 77.12.040, 82-04-034 (Order 177), § 232-12-064, filed 1/28/82; 81-12-029 (Order 165), § 232-12-064, filed 6/1/81. Formerly WAC 232-12-173.]

WAC 232-12-067 Sale of wildlife. (1) It is unlawful for publicly-owned zoos or aquariums who lawfully acquired wildlife under WAC 232-12-064 to offer for sale or sell that wildlife or the progeny of that wildlife except

outside the state or except within the state to other publicly-owned zoos or aquariums or accredited institutional members of the American Association of Zoological Parks and Aquariums (AAZPA).

(2) It is unlawful for publicly-owned zoos or aquariums who lawfully acquired wildlife under WAC 232-12-274 to offer for sale or sell that wildlife or the progeny of that wildlife except the progeny may be sold to other publicly-owned zoos or aquariums or accredited institutional members of the American Association of Zoological Parks and Aquariums (AAZPA).

(3) Publicly-owned zoos and aquariums will keep accurate and current records of the sale of wildlife progeny as required by the director. These records will be maintained on a calendar year basis and retained for a period of 5 years.

(4) It is unlawful for any publicly-owned zoo or aquarium to fail to complete and submit to the department by January 31 of each year a report containing information required by the director.

(5) Wildlife agents may inspect at reasonable times and in a reasonable manner the wildlife, permits, records, and facilities of any publicly-owned zoo or aquarium offering for sale or selling wildlife.

[Statutory Authority: RCW 77.12.030, 87-18-017 (Order 296), § 232-12-067, filed 8/24/87.]

WAC 232-12-071 Buying or selling game unlawful. Unless prohibited by federal regulations, nonedible parts of wild animals, game birds or game fish lawfully taken may be offered for sale, sold, purchased or traded, EXCEPT,

It is unlawful to offer for sale, sell, purchase or trade cougar, mountain sheep, mountain goat, velvet antlers of deer or elk or the gall bladder, claws and teeth of bear, except those claws and teeth permanently attached to a full bear skin or mounted bear, unless the offer for sale, sale, purchase or trade is authorized by a written permit issued by the director.

[Statutory Authority: RCW 77.12.040, 82-04-034 (Order 177), § 232-12-071, filed 1/28/82; 81-12-029 (Order 165), § 232-12-071, filed 6/1/81. Formerly WAC 232-12-171.]

Common Name	Scientific Name
mountain goat	*Oreamnos americanus*
mountain sheep	*Ovis canadensis*
bull frog	*Rana catesbeiana*

(2) Furbearing animals are game animals and include:

Common Name	Scientific Name
beaver	*Castor canadensis*
muskrat	*Ondatra zibethicus*
fox	*Vulpes vulpes*
raccoon	*Procyon lotor*
marten	*Martes americana*
short-tailed weasel or ermine	*Mustela erminea*
long-tailed weasel	*Mustela frenata*
mink	*Mustela vison*
badger	*Taxidea taxus*
river otter	*Lutra canadensis*
lynx	*Lynx canadensis*
bobcat	*Lynx rufus*

[Statutory Authority: RCW 77.12.020 and 77.12.040. 91-11-007 (Order 492), § 232-12-007, filed 5/2/91, effective 6/2/91. Statutory Authority: RCW 77.12.040, 82-19-026 (Order 192), § 232-12-007, filed 9/9/82; 81-22-002 (Order 174), § 232-12-007, filed 10/22/81; 81-12-029 (Order 165), § 232-12-007, filed 6/1/81. Formerly WAC 232-12-040.]

WAC 232-12-017 Deleterious exotic wildlife. Deleterious exotic wildlife includes:

(1) Fish

(a) In the family Claridae, (walking catfish) all members of the family

(b) In the family Chprinidae, (Diploid Grass carp.) *Ctenopharyngodon idella*

(c) In the family Amiidae, (bowfin, mudfish or grinnel) Amia calva

(d) In the family Characidae, the piranha (also pirameba, caribe, pira, piraya, chubita, rodoleira, palometa), all species of the general Serrasalmus, Rooseveltiella and Pygocentrus

(e) In the family Cyprinidae, the rudd (Scardinius erythropthalmus) and Ide (silver orfe or golden orfe (leuciscus idus))

(f) In the family Lepiosteidae, the gar-pikes

(g) In the family Channidae, the snakeheads (China fish) and all forms of the genus Channa (Ophicephalus)

(2) Amphibians

(a) In the family Pipidae, the African clawed frog (*Xenopus laevis*)

(3) Birds

(a) In the family Anatidae, the mute swan (Cygnus olor)

(4) Mammals

(a) In the family Viverridae, the mongoose (all members of the genus Herpestes

(b) In the family Suidae, the wild boar[,] (*Sus scrofa* and all wild hybrids)

(c) In the family Tayassuidae, the collared peccary (javelina) (*Tayassu tajacu*)

(d) In the family Bovidae, all members and hybrids of the following genera – Rupicapra (Chamois); Hemitragus (Tahr); Capra (goats, ibexes except domestic goat Capra (hircus); Ammotragus (Barbary sheep or Aoudad); and Ovis (only mouflon species – Ovis musimon)

(e) In the family Cervidae, the european red deer (Cervus elaphus), all nonnative subspecies, and all hybrids with North American elk.

(5) It is unlawful to import into the state, hold, possess, propagate, sell, transfer, or release live specimens of deleterious exotic wildlife except as provided under (6) or (7) below.

(6) Scientific research or display: The director may authorize a person to import into the state, hold, or possess live specimens of deleterious exotic wildlife for scientific research or for display by zoos or aquariums

who are accredited institutional members of the American Association of Zoological Parks and Aquariums (AAZPA) provided: (a) The specimens are confined to a secure facility, (b) the specimens will not be transferred to any other location, except to and by other AAZPA accredited facilities with written director approval, (c) the specimens will be euthanized and all parts incinerated at the end of the project, except federally listed endangered or threatened species may be transferred to AAZPA facilities with written director approval, and (d) the person will keep such records on the specimens and make such reports as the director may require.

(7) Retention or disposal of existing specimens in captivity: A person holding exotic wildlife specimens in captivity which are classified by the wildlife commission as deleterious exotic wildlife may retain the specimens he/she lawfully possesses prior to January 18, 1991 provided: (a) The person reports to the director in writing by March 18, 1991 the species, number and location of the specimens, (b) the specimens are confined to a secure facility at the location reported, and (c) live specimens are not propagated, sold, transferred, or released, except for transfer or sale to locations outside the state of Washington, except federally listed endangered or threatened species may be transferred to AAZPA facilities with written director approval.

[Statutory Authority: RCW 77.12.020, 91-03-082 (Order 482), § 232-12-017, filed 1/17/91, effective 1/18/91; 90-[illegible] (Order 434), § 232-12-017, filed 5/1/90, effective [illegible] Statutory Authority: RCW 77.12.040, 85-[illegible]014 (Order 247), § 232-12-017, filed 4/9/85;

81-22-002 (Order 174), § 232-12-017, filed 10/22/81; 81-12-029 (Order 165), § 232-12-017, filed 6/1/81.]

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules, and deems ineffectual changes not filed by the agency in this manner. The bracketed material in the above section does not appear to conform to the statutory requirement.

SUMMARY OF APPELLANTS' EXCERPTS OF RECORD BELOW

I. APPELLANTS OFFERED THE EXPERT TESTIMONY FROM THE FOLLOWING INDIVIDUALS BELOW.

A. *Dr. Robert W. Mead*: State Veterinarian for the Washington Department of Agriculture. As state veterinarian Dr. Mead is charged with the responsibility of the animal health programs in Washington State which includes disease monitoring on import, monitoring health certificates, imposing quarantines on diseased animals, and eradicating various diseases. Shares responsibility with United States Department of Agriculture veterinarians for the inspection of meat. Excerpts of Record Below, p. 132-134.

B. *Dr. Donald S. Davis, D.V.M.*: Employed as a faculty member of Department of Veterinary Pathobiology, the Texas Veterinary Medical Center College of Veterinary Medicine, and the Department of Wildlife and Fisheries Sciences, College of Agriculture and Life Sciences, Texas A&M University, and the Texas Agricultural Experiment Station. For twenty years, Dr. Davis' main research interest has been in the diagnosis, prevention, treatment and control of infectious and parasitic diseases of free-ranging and captive wildlife with emphasis on those diseases shared by wildlife with domestic livestock and/or humans. Dr. Davis serves on many national committees that deal with wildlife disease issues such as the rabies and wildlife and disease committees of the United States Animal Health Association; the USDA/APHIS Technical Advisory Committee on Feral Swine; the Tri-State Committee on Brucellosis in the Greater Yellowstone Area; and Scientific Advisor to the American

Bison Association, the North American Deer Farmers Association, and the Exotic Wildlife Association. Excerpts of Record Below, p. 209-211.

C. *Dr. William J. Foreyt*: Professor in the College of Veterinary Medicine at Washington State University, Pullman, Washington. Dr. Foreyt has written approximately 140 publications which reflect the work Dr. Foreyt has done in the area of veterinary parasitology and wildlife diseases. Excerpts of Record Below, p. 303-320.

D. *Dr. Jim William*: State Veterinarian for the Colorado Department of Agriculture. Excerpts of Record Below, p. 449.

E. *Dr. Joe W. Templeton, D.V.M.*: Professor of Genetics and Veterinary Pathobiology, College of Veterinary Medicine, Texas A&M University, College Station, Texas. Dr. Templeton actively researches comparative genetics of mammals, including cervids. Dr. Templeton has written a number of papers concerning cervid genetics. Excerpts of Record Below, p. 428.

F. *Dr. Douglas E. Dix*: An expert in entomological zoology and wildlife toxicology, providing advice to universities, government and industry. Dr. Dix's primary area of expertise is experimental design analysis and statistical interpretation of wildlife field data.

II. APPELLANTS' EXPERTS OFFERED THE FOLLOWING EVIDENCE REGARDING AVAILABLE ALTERNATIVES BELOW

A. BOVINE TUBERCULOSIS

Effective tests for bovine TB exist and are used on all captive cervid herds in Washington (Excerpts of Record Below: Williams p. 450, Davis 213, Mead 150).

1. *Dr. Mead*

   a. As state veterinarian, he has authority to regulate imported animals. Imposes TB testing (single cervical and herd test within 6 months and for any added animal). (Excerpts of Record Below p. 157)

   b. TB tests for cervids have 80% – 85% effectiveness, which is the same as cattle. (Excerpts of Record Below p. 148 – 150)

   c. It is the same skin test used in humans and cattle. Success of TB eradication programs cannot be denied. (Excerpts of Record Below p. 132)

   d. There is adequate TB protection now, but the state could add more *e.g.* herd test and quarantine period with a retest. (Excerpts of Record Below p. 185)

   e. Washington is "TB-Free" USDA designated.

2. *Dr. Williams*

   a. Single Cervical TB test used in conjunction with Comparative Cervical TB test is adequate to detect TB in cervids. (Excerpts of Record Below p. 450)

B. BRUCELLOSIS

Effective test for brucellosis exist and are used on all captive herds in Washington when medically indicated or when moved in interstate commerce. (Excerpts of Record Below: Davis 213-214, Mead 155)

1. *Dr. Mead*

   a. Animals currently tested for Brucellosis before entering or leaving the state and pose no greater threat to wildlife than domestic animals. (Excerpts of Record Below p. 185)

2. *Dr. Davis*

   a. Alternative livestock react to established tests and can be vaccinated same as domestic stock. (Excerpts of Record Below p. 213)

   b. An effective blood test is available and required by State Veterinarian. (Excerpts of Record Below p. 214)

   c. Substantial Data shows Brucellosis is not transmitted or maintained in wildlife populations – based on 40 years worth of data. (Excerpts of Record Below p. 213-14)

   d. Brucellosis is a disease of confinement. (Excerpts of Record Below p. 214) (Yellowstone example)

C. PARASITES (Meningeal Worm)

Meningeal worm has yet to infest livestock in Washington, despite over a century of unregulated importation and transportation.

1. *Dr. Foreyt*

   a. Based on all data, risk of meningeal worm problem is low. (Excerpts of Record Below p. 306)

   b. The risks are well studied and understood. (Excerpts of Record Below p. 306)

   c. Meningeal worm is rapidly fatal to cervids such as fallow deer, elk and sika. (Excerpts of Record Below p. 306)

   d. State can eliminate risk by not importing any animal from east of Meningeal worm line. By using documentation and tagging system. This is an enforcement issue. (Excerpts of Record Below p. 307)

   e. White-tail deer are the only likely danger of carrying meningeal worm. (Excerpts of Record Below p. 306)

2. *Dr. Mead*

   a. Alternative livestock pose no greater threat to native species than do domestic animals. (Excerpts of Record Below p. 185)

   b. Solution to ban the import of white-tail deer and to not allow the importation of other cervids from east of meningeal worm line. (Excerpts of Record Below p. 186)

D. GENETIC PURITY

1. *Dr. Templeton*

   a. The gene pool of native wildlife cannot be altered unless 1-5% of wild herds are populated with fertile, escaped animals,

which is extremely unlikely. (Excerpts of Record Below p. 433)

b. Escaped fallow deer, mouflon sheep, etc. will not out-compete other native species for forage, browse, etc. (Excerpts of Record Below p. 436)

c. Escapes are rare, and will continue to be so because: (1) strong herd instinct of the animal cause it to stay with its herd (and source of easy food); (2) the farmers have strong economic incentive to prevent accidental releases; and (3) the technology of preventing escapes is reliable and available. (Excerpts of Record Below p. 432-35)

MOTION FILED
JUL 28 1994

No. 94-20

(2)

In The

Supreme Court of the United States

October Term, 1994

PACIFIC NORTHWEST VENISON PRODUCERS, a Washington corporation; ROBERT V. BAKER; JAMES E. RICH; D. BRUCE MORGAN; and WASHINGTON ALTERNATIVE LIVESTOCK ASSOCIATION, a Washington corporation,

Petitioners,

v.

CURT SMITCH, Director of Washington Department of Wildlife; DEAN A. LYDIG, JAMES M. WALTON, MITCH JOHNSON, TERRY KARRO, JOHN McGLENN, NORMAN F. RICHARDSON, Commissioners of the Washington State Wildlife Commission; and the WASHINGTON STATE DEPARTMENT OF WILDLIFE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Supreme Court

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF ON BEHALF OF NORTH AMERICAN ELK BREEDERS ASSOCIATION, IDAHO VENISON COUNCIL, COLORADO ELK AND GAME BREEDERS ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION AND NORTHWEST LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR CERTIORARI

JEANETTE R. BURRAGE
Northwest Legal Foundation
557 Roy Street, Suite 100
Seattle, WA 98109-4219
(206) 283-0503

Attorney for Amici Curiae

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14 pp

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The North American Elk Breeders Association (NAEBA), Idaho Venison Council (IVC), Colorado Elk and Game Breeders Association (CEGBA), National Cattlemen's Association (NCA) and Northwest Legal Foundation (NLF) respectfully petition the court to file the annexed amici curiae brief. Petitioners have consented to the filing of this brief, while Respondents have not consented.

As with all fundamental rights, violation of one person's rights decreases the rights of everyone. The NLF believes deer and elk farmers have the right to safely conduct their business and that the Commerce Clause's function of promoting interstate commerce has been violated by the Washington Department of Wildlife. The effect of upholding the propagation and import bans on elk and deer breeders here is not just the economic protectionism that is found in other cases, but a method of selecting for elimination specific economic endeavors that may not be socially acceptable.

For the foregoing reason the NAEBA, IVC, CEGBA, NCA and NLF request that this motion for leave to file the annexed amici curiae brief be granted.

DATED: July 28, 1994

Respectfully submitted,

JEANETTE R. BURRAGE
Northwest Legal Foundation
557 Roy Street, Suite 100
Seattle, WA 98109-4219
Telephone: (206) 283-0503

Attorney for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI 1

I. STATEMENT OF INTERESTS 1

II. SUMMARY OF ARGUMENT 3

III. ARGUMENT 4

A. The Ninth and Tenth Circuits have issued conflicting decisions 4

B. A factual record is needed in this case, but summary judgment affidavits are all that is available 5

C. The state's regulations violate the Commerce Clause 7

IV. CONCLUSION 10

TABLE OF AUTHORITIES CITED

Page

CASES

Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 477 U.S. 242, 91 L.Ed.2d 202 (1986) 6

Crutcher v. Kentucky, 141 U.S. 47, 57 (1891) 7

Dorrance v. McCarthy, 957 F.2d 761 (10th Cir. 1992) ...2, 4

Industrial Union v. American Petroleum, 100 S.Ct. 2844, 448 U.S. 681, 65 L.Ed.2d 1010 (1980) ... 7, 8, 10

Maine v. Taylor, 106 S.Ct. 2440, 477 U.S. 131, 91 L.Ed.2d 110 (1986) 3, 7, 9

Pike v. Bruce Church, Inc., 90 S.Ct. 844, 397 U.S. 137, 25 L.Ed.2d 174 (1970) 4, 8

Sartor v. Arkansas Natural Gas Corp., 64 S.Ct. 724, 321 U.S. 620 (1944) 6

Sugarman v. Dougall, 413 U.S. 634 (1973) 7

UNITED STATES CONSTITUTION

Commerce Clause 3, 8, 10

STATE STATUTES

RCW 77.12.040 8

I. STATEMENT OF INTERESTS

The North American Elk Breeders Association (NAEBA) is a non-profit organization dedicated to the promotion and growth of the domestic elk industry in North America as an alternative form of livestock production. Most of its members are farmers and ranchers who raise cattle and sheep. NAEBA currently has 582 members in good standing in 35 states, 5 provinces and 5 countries. NAEBA members currently own 12,000 of the 20,000 elk presently raised in the United States. Each year, members of NAEBA sell millions of dollars worth of their animals in interstate commerce. More than 80% of the sales are interstate sales. (For example, one Montana game farm operator recently purchased over $1,200,000 worth of animals from Missouri.) NAEBA's role is to serve the industry as its spokesman, representing its members in matters of mutual concern in order to further the development and growth of this alternative livestock industry.

The economic value of the elk industry alone is substantial, and is growing each year. Live animals in the United States alone have a value of over $80,000,000. Fences, handling facilities and land on which these animals are raised account for an additional $70,000,000.

Live elk sales in the United States in 1992 amounted to $24,000,000, representing the sale of over 6,000 head of which 80%, or approximately $20,000,000, are from interstate sales. In addition, sales of animal byproducts and meat accounted for another $1,000,000 of sales, 95% of which occurred in interstate commerce.

While NAEBA members must raise elk to qualify for membership, many of its members also raise other

"exotic" species, such as deer, bison, yak, llamas, etc. In addition to the 20,000 elk throughout the United States, there exist approximately 120,000 bison, approximately 7,000 red deer, and approximately 28,000 fallow deer.

The NAEBA has participated in a similar case involving an attempted ban on the private ownership and importation of big game animals in Wyoming. *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992).

The Idaho Venison Council (IVC), with 21 members, represents the majority of deer and elk producers in Idaho. IVC producers currently farm deer and elk primarily as breeders and for velvet antler. They have worked with the Idaho Legislature to put regulation of their industry under the jurisdiction of the Idaho Department of Agriculture. IVC members may be affected by the precedent set in this case.

The Colorado Elk and Game Breeders Association (CEGBA) has over 75 members. The association and its members are satisfied with the current Colorado requirements on their industry. They are concerned that bans in other states may be used to establish a ban on their livelihood in Colorado.

The National Cattlemen's Association (NCA) is a non-profit trade association that speaks for 230,000 cattlemen and others from all segments of the beef cattle industry. It is affiliated with 46 state cattle associations and 29 national beef breed organizations. NCA's mission is to advance the economic, political, and social interests of the U.S. cattle industry, and works to create a positive business environment while providing consumers with a safe and wholesome product.

The Northwest Legal Foundation (NLF) is a non-profit public interest law firm. It is dedicated to protecting constitutional rights associated with the ownership and use of private property. The NLF believes that in the United States property rights are fundamental and are the underpinnings for our other individual freedoms and economic success.

The interests of the NAEBA, IVC, CEGBA and NCA in the outcome of this lawsuit are directly tied to the welfare of their members nationwide. The NLF's interest is in protection of individual rights throughout the United States. If the decision of the Ninth Circuit is allowed to stand, no livestock producer or other business owner can feel secure. The same rationale could and might be used to ban cattle, sheep, bison, llama, yak and any other conventional or alternative livestock, or other types of business operations, in any state in the nation.

II. SUMMARY OF ARGUMENT

Balancing local interests with the duty of Congress to prevent barriers against interstate trade is required in any Commerce Clause decision. *Maine v. Taylor*, 106 S.Ct. 2440, 2447, 477 U.S. 131, 91 L.Ed.2d 110 (1986). Here, the balancing is a shot in the dark, because a trial on the factual disputes was not held. The facts presented by appellants lead to the conclusion that they could prevail at the trial level if those facts are proven with the evidence that would be gathered and presented at such trial.

The Commerce Clause has been violated. The commerce ban here is clearly excessive in relation to the local interest.

III. REASONS FOR GRANTING THE WRIT

A. The Ninth and Tenth Circuits have issued conflicting decisions.

Both the Ninth and Tenth Circuits principally based their decisions on *Pike v. Bruce Church, Inc.*, 90 S.Ct. 844, 847, 397 U.S. 137, 25 L.Ed.2d 174 (1970). The different interpretations by each court led to different results, even though the issues and subject matter were nearly the same. Plaintiffs in both cases were elk or deer farmers faced with a ban on importation and breeding of their stock.

The statement in *Pike* quoted in both Courts provides:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142 (internal citations omitted).

In *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992), the court found that inquiries into the extent of the burden on commerce and whether lesser impact regulations would suffice were essential to fulfill the *Pike* test. 957 F.2d at 763.

In this case, the Ninth Circuit found that unless the appellants could prove their alternatives could *eliminate* risk, no balancing would be done and the regulation would be valid. The court reached this result despite other findings that:

> . . . [A]t some point the risks presented by proposed alternatives as compared to challenged regulations would be so small that courts should not give them credence. PNVP has arguably offered evidence that could support a finding that its proposed alternatives would reduce the risks to that point.

Petition for Writ of Certiorari (Petition), App. 20.

B. A factual record is needed in this case, but summary judgment affidavits are all that is available.

The District Court found the interest of the Washington Department of Wildlife in preventing disease in wildlife was "legitimate". Petition, App. 36. It apparently accepted the arguments of the Department below that an elk or deer brought into Washington *may* have a disease, that disease in that particular animal *might* not be detected by the Washington State Veterinarian, the diseased animal or one infected by it *might* escape, the escaped animal *might* infect a wild elk or deer, and this would lead to "catastophic consequences." However, no citation was given for the claim of catastrophic consequences.

Risk factors are often hard to determine even with a full factual record. Here, the record allows for no calculation of risk factors. This court has not approved summary judgments that rest on credibility determinations.

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2513, 477 U.S. 242, 255, 91 L.Ed.2d 202 (1986).

Here, the District Court weighed the credibility of expert affidavits. It was found that because the experts admitted the tests for animal disease were not 100% accurate on an individual animal, the tests were not a viable alternative, despite the same expert's testimony that such tests were effective. Donald Davis Declaration, ER 209. The Court reached this result despite the fact that such tests are the same as those used for cattle and for humans! *Id.*

Neither the petitioners' nor respondents' experts were subject to cross-examination. Yet cross-examination is the best method yet devised for testing trustworthiness of testimony. *Sartor v. Arkansas Natural Gas Corp.*, 64 S.Ct. 724, 729, 321 U.S. 620 (1944).

Here, the respondents' experts were believed despite (1) the District Court discovery that respondents' testimony about disease in a Washington herd and another disease occurrence in Montana were *false* (Petition, App.

29); and (2) the rule that the evidence of the petitioners (the non-moving parties) is to be believed, and all justifiable inferences are to be drawn in their favor.

Here, it is unclear whether the District Court required petitioners to file a summary judgment motion in an effort to make weighing the evidence more appropriate. However, as this Court has held, weighing the evidence is not appropriate on any summary judgment motion.

C. The state's regulations violate the Commerce Clause.

A citizen's ability to participate in the economy is a privilege guaranteed by the United States Constitution. *Sugarman v. Dougall,* 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting, citing *Crutcher v. Kentucky,* 141 U.S. 47, 57 (1891)). The Commerce Clause plays an important role in protecting the free flow of interstate trade. *Maine v. Taylor, supra.*

Here, the regulations at issue not only block interstate commerce, they prohibit the legitimate farming of animals. (Petition, App. 46). The state's claimed local interest is protection of wildlife from disease and interracial commingling. This interest must not be irrational, or it would be arbitrary and capricious.

The local interest here is not public health, but animal health. In a case where human health was the issue, rational risks are still necessary, or regulations could "close every business in this nation". *Industrial Union v. American Petroleum,* 100 S.Ct. 2844, 2882, 448 U.S. 681, 65 L.Ed.2d 1010 (1980) (Rehnquist, J., concurring).

In *Industrial Union,* the issue was whether reducing the level of benzene exposure limits from 10 parts per million (ppm) to 1 ppm, by the Occupational Safety and Health Administration (OSHA) was based on substantial evidence. This Court found OSHA must show that a toxic substance poses a "significant health risk" as a threshold question, before creating new standards. *Industrial Union,* 100 S.Ct. at 2850.

While there is not plain legislative criteria that the risk to animals must be "significant" before regulations are adopted, there are two reasons why such a requirement is necessary in this case. First, the statute authorizing the regulation, RCW 77.12.040, only allows the Department of Wildlife to regulate "deleterious" exotic wildlife. (Petition, App. 46). "Deleterious" to wildlife, like "material" impairment to health of humans in *Industrial Union,* must be considerably more dangerous than risk free. This Court has found "safe" is not the equivalent of "risk free".

> There are many activities we engage in every day – such as driving a car or even breathing city air – that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe".

Industrial Union, 100 S.Ct. at 2864.

Second, the burden on interstate commerce must be outweighed by the local interests, or the Constitution is violated. The Commerce Clause is violated if the burdens on interstate trade are clearly excessive in relation to local benefits. *Pike v. Bruce Church, supra.* That balancing requires a weighing of both the burdens and the local

benefits. As characterized above in Section B, the Department's claims of hunches and potential maybes do not produce substantial evidence of a significant risk. Therefore, the local benefit is minimal or non-existent.

The effects on interstate commerce were not thoroughly determined below, but thousands of animals and thousands of millions of dollars are being affected. Declaration of James E. Rich, ER 372-410.

Petitioners contend that testing for disease by the State Veterinarian, as was done before the ban, is a viable means to control disease. The District Court found these tests ineffective (through summary judgment) even though expert affidavits claimed 80-85% accuracy on a particular animal. ER 162, ER 236. The District Court's finding was based on dicta in *Maine v. Taylor, supra.*

The issue in *Maine* was an import ban on baitfish. Tests on these fish were found wanting because of the "small size of baitfish and the large quantities in which they are shipped." *Maine,* 106 S.Ct. at 2449. Here, the animals are large and each tested individually. One of the many adequate and available alternatives which would address the state's concerns would be a requirement that a positive test result in one animal trigger rechecks of the entire herd.

Even without a voluminous record, it is clear the situation here is very different than that in *Maine.* Here the risks of importing disease (let alone escape and infection of wild animals) are reduced to practically nothing. Expert affidavits explained how other states have effectively protected wildlife without banning the industry. ER 209, ER 347-362 & ER 449. Even though elk and deer

have been imported and farmed in Washington state for years prior to the ban, Washington is disease free. (Petition, p. 9).

IV. CONCLUSION

The record in this case does not lend itself to the balancing of interests required in Commerce Clause cases. While the Department of Wildlife claims, through some affidavits, that there might be a risk to wildlife from deer and elk farming, the Department has not produced substantial evidence that the risk is so great that interstate commerce must be halted and an industry closed. As stated in *Industrial Union*, 100 S.Ct. at 2875, "Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible." This Court should accept certiorari to enable petitioners to argue the merits of their appeal.

DATED: July 28, 1994

Respectfully submitted,

JEANETTE R. BURRAGE
Northwest Legal Foundation
557 Roy Street, Suite 100
Seattle, WA 98109-4219
Telephone: (206) 283-0503

Attorney for Amici Curiae

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NO. 94-20

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1994

PACIFIC NORTHWEST VENISON PRODUCERS, a Washington corporation, et al., Petitioners,

v.

CURT SMITCH, Director of Washington Department of Wildlife, et al., Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PACIFIC NORTHWEST VENISON'S PETITION FOR WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General

ROBERT K. COSTELLO
Sr. Assistant Attorney General
Counsel of Record
JAY D. GECK
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ROBERT K. COSTELLO
Sr. Assistant Attorney General
Counsel of Record
JAY D. GECK
Assistant Attorney General
Attorneys for Respondents

QUESTIONS PRESENTED

Contemporary Commerce Clause analysis subjects state regulations to alternative tests depending upon whether the regulations affirmatively discriminate against out-of-state commerce to achieve some economic advantage or whether the regulations apply evenhandedly, with an incidental burden on out-of-state commerce. The regulations at issue here made it unlawful, with certain exceptions, to "import into the state, hold, possess, propagate, offer for sale, sell, transfer, or release" certain animals. The questions presented by the Ninth Circuit's resolution of the Commerce Clause challenge to these regulations are as follows:

1. Whether Washington's regulations are per se discriminatory simply because they include the word "import" or whether the entire regulation should be considered to determine its discriminatory nature or lack thereof.

2. Whether the court below employed the correct tests for analyzing Washington's regulations under the Commerce Clause and the correct standards for resolving the issues raised on cross motions for summary judgment.

LIST OF PARTIES

The Washington State Department of Wildlife (hereinafter referred to as "Department") was dismissed from this lawsuit based on Eleventh Amendment immunity. (9/2/92 Memorandum Decision of the United States District Court, Western District of Washington, Honorable William L. Dwyer.) The dismissal of the Department was not appealed. Consequently, the Department is not party to this case as petitioners had alleged. All other parties are as listed in the caption of the petition.

TABLE OF CONTENTS

I. **STATEMENT OF THE CASE** 1
A. *Nature Of The Case.* 1
B. *Course Of Proceedings And Disposition Below.* 2
C. *Statement of Facts.* 2
1. *Description of Regulatory Backdrop and of the Temporary Rules Regulating "Game Farming" and "Game Ranching."* 2
2. *Risks to Native Wildlife Addressed by Regulation of "Game Farming" and "Game Ranching."* 5

II. **REASONS FOR DENYING THE PETITION** 9
A. **The Opinion Below Correctly Employs The Tests For Determining If State Regulations Discriminate Against Out-Of-State Commerce And If The Burden Imposed By Such Regulations Is Clearly Excessive.** 10
B. **The Court of Appeals Applied The Proper Standard of Review For Evenhanded State Regulations That Have Incidental Effects On Interstate Commerce.** 13
1. *There Are No Genuine Issues of Material Fact Regarding the Putative Local Benefits of the Regulations.* 14
2. *There Are No Genuine Issues of Material Fact Regarding the Absence of Less Burdensome Alternatives.* 15
3. *There Are No Genuine Issue of Material Fact Regarding the Burdens on Interstate and Foreign Commerce.* 21

III. **CONCLUSION** 22

TABLE OF AUTHORITIES

Cases — Page

Dorrance v. McCarthy,
957 F.2d 761 (10th Cir. 1992) 12

Hughes v. Oklahoma,
411 U.S. 322, 336 (1970) 11, 13, 14

Maine v. Taylor,
477 U.S. 131, 138 (1986) 10, 13, 14

Minnesota v. Cloverleaf Creamery Co.,
449 U.S. 456, 471 (1981) 11

Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas,
49 U.S. 493, 525-26 (1989) 11

Pacific Northwest Venison Producers, et al. v. Curt Smitch, et al.
20 F.3d 3042 (9th Cir. 1994) 2, 11, 12, 14, 20, 21

Pike v. Bruce Church, Inc.,
397 U.S. 137, 142 (1970) 14, 15

Statutes & Regulations

Fed. R. Civ. P. 56(c) 20

RCW 77.12.030 4

RCW 77.16.040 4

RCW 77.12.020(7) . . . . . 3.

WAC 232-12-017(5) 4

WAC 232-12-021 3

WAC 232-12-064 . . . . . 3, 4

WAC 232-12-064(5) 4

WAC 232-12-017 3-5

WAC 232-12-064(2) 5

Wyo. Stat. § 23-1-103 12

Wyo. Stat. § 23-3-301 12

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I. STATEMENT OF THE CASE

A. *Nature Of The Case.*

Petitioners, et al. (hereinafter Petitioners or PNVP) filed a lawsuit challenging the constitutionality of temporary regulations adopted by the Department and the Wildlife Commission on June 19, 1992. PNVP sought declaratory relief,

injunctive relief, and damages arguing that the temporary regulations violated the Equal Protection, Due Process, and Commerce Clauses, that the regulations constituted a regulatory taking of property without just compensation, and that the regulations were preempted by the Endangered Species Act, 16 U.S.C. { 1531, et seq., and the Animal Welfare Act, 7 U.S.C. { 2131, et seq.

B. *Course Of Proceedings And Disposition Below.*

On August 10, 1992, the district court heard oral argument on cross motions for summary judgment on all constitutional issues. SER 20. On September 2, 1992, the district court issued a memorandum decision, injunction, and order dismissing the bulk of PNVP's claims, including the Commerce Clause claim.

Petitioners appealed only the Commerce Clause issue which the Ninth Circuit resolved in respondents favor; *Pacific Northwest Venison Producers, et al. v. Curt Smitch, et al.* 20 F.3d 3042 (9th Cir. 1994) (Appendix 1, et seq. to Petition for Writ of Certiorari).

C. *Statement of Facts.*

1. *Description of Regulatory Backdrop and of the Temporary Rules Regulating "Game Farming" and "Game Ranching."*

On June 19, 1992, the Washington State Wildlife Commission and the Director of the Department acted on an emergency basis to amend three existing administrative regulations pertaining to the importation and retention of certain "wildlife" species and "deleterious exotic wildlife."[1]

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[1]Wildlife is defined in RCW 77.08.010(16) as:

> all species of the animal kingdom whose members exist in Washington in a wild state.

As of June 19, 1992, the State of Washington had no regulations in effect to protect resident wildlife against the risks posed by certain species held on game farms and/or game ranches. Contrary to PNVP's assertions, the Washington State Department of Agriculture had no regulations or authority to require testing, quarantine or destruction of captive wildlife or exotic cervids.

On June 19, the Department amended WAC 232-12-017 (deleterious exotic wildlife), WAC 232-12-064 (live wildlife) and WAC 232-12-021 (importation and retention of dead nonresident wildlife). The petitioners did not challenge WAC 232-12-021 (importation and retention of dead nonresident wildlife), and it will not be discussed further.

WAC 232-12-017 was promulgated by the Department pursuant to express statutory authority that empowers and directs the Commission to designate as deleterious exotic wildlife, those species of the animal kingdom, not native to Washington, which are dangerous to the environment or wildlife of the state. RCW 77.12.020(7).

Prior to the subject amendments, WAC 232-12-017 designated 20 individual animals, 10 genera and one family of

---

> This includes but is not limited to mammals, birds, reptiles, amphibians, fish and invertebrates. The term "wildlife" does not include feral domestic mammals, the family Muridae of the order Rodentia (old world rats and mice), or those fish, shellfish, and marine invertebrates classified by the director of fisheries. The term "wildlife": includes all stages of development and the bodily parts of wildlife members.

Deleterious exotic wildlife is defined in RCW 77.08.010(25) as: "species of the animal kingdom, not native to Washington and designated as dangerous to the environment or wildlife of the state."

animals, and made it unlawful to: "import into the state, hold, possess, propagate, sell, transfer or release live specimens" of these animals, WAC 232-12-017(5) (pre-June 19, 1992).

The subject amendments to WAC 232-12-017 designated as deleterious, nine additional species in the family Bovidae and four species (sub-species) in the family Cervidae (exotic deer). For the reasons identified in the affidavits of Dr. Briggs Hall, Dr. Tom Thorne, Dr. Margaret Pybus, Dr. Peter Dratch, Mike Davison, Gary Burke, Huey Dawson, Max Zahn, Woodrow Myers, Dr. Michael Miller and N. Thompson Hobbs, each newly designated species presents serious risks to the environment and wildlife of the state. The nature of the risks posed by these species is discussed in more detail below.

WAC 232-12-064 is promulgated pursuant to express authority in the Director of the Department to regulate the collection, importation, and transportation of wildlife. RCW 77.12.030. WAC 232-12-064 was amended on June 19 to prohibit importation, possession, propagation, or transfer of four species in the family of Cervidae (deer, elk and moose), and to reinforce that the sale or other commercialization of those species is illegal.

It has never been legal to "[sell] or otherwise commercialize on" such wildlife. WAC 232-12-064(5) (pre-June 1992). In the absence of authorizing rules, the importation, sale, possession, etc., of wildlife is unlawful pursuant to state law; RCW 77.16.040, which provides in pertinent part:

> Except as authorized by law or rule, it is unlawful to bring into this state, offer for sale, sell, possess, exchange, buy, transport, or ship wildlife or articles made from an endangered species. . . .

Under this law and department rules, as they existed both before and after the subject amendments, it is illegal to offer for sale, sell, purchase or trade the venison, or other edible parts, or velvet antlers of deer or elk species which exist in a wild state in Washington. To the extent petitioners were engaged in the commercialization of native deer or elk species, they were in

violation of state law prior to the subject amendments. PNVP never challenged this state law.

The subject amendments to the regulations were adopted on an emergency basis so as to protect Washington's wildlife resource against the risks posed by game farming and game ranching of the subject species while the Department worked with interested parties to develop permanent regulations addressing the subject.

2. ***Risks to Native Wildlife Addressed by Regulation of "Game Farming" and "Game Ranching."***

At the risk of oversimplifying the issues, the emergency regulations were aimed at addressing five categories of risk to resident wildlife. These risks may be summarized as follows:

1. Introduction/spread of diseases such as tuberculosis, brucellosis, malignant catarrhal fever, etc.
2. Introduction of parasites such as meningeal worm.
3. Hybridization between exotic species/hybrids and resident wildlife.
4. Habitat competition and displacement of resident wildlife.
5. Enforcement related risks such as theft of wildlife and/or poaching.

Although the quantum of risk may vary, the species added to WAC 232-12-017 and those specifically regulated pursuant to WAC 232-12-064(2), were added in June 1992 because they pose one or more of these five risks to resident wildlife.

In addition to the five risk factors mentioned above, there is an additional element concerning the potential for escape of captive animals and the ingress and egress of resident wildlife into areas holding the regulated animals.

The district court was provided with substantial evidence from both sides concerning the risks associated with the captive raising of exotic animals and wildlife. There was some disagreement among experts as to the quantum of risk to native wildlife posed in each of these areas by the various species with which the rules are concerned. There was also disagreement as to what quantum of risk to native wildlife should be tolerated by society in return for the benefits some believe game farming affords.

There was, however, no disagreement that as to each of these areas of risk, there is some real and substantial risk associated with game farming the animals addressed by these regulations. The undisputed and/or undisputable evidence concerning these risks was the basis upon which the district court could and did render summary judgment, and upon which the Ninth Circuit determined the Commerce Clause issue.
The undisputable facts regarding escape and the five risk categories will be discussed in turn.

a. *Escape*

There was no dispute that game farmed and/or ranched animals escape their enclosures. Despite stringent fencing requirements, there have been numerous documented escapes from game farms and game ranches within Colorado, Montana, Oregon and Washington. SER 280-81, SER 219-31, SER 171-74, SER 184-85. Escapes have resulted from (1) snow drifting over the fences and crusting hard enough for an animal to walk on; (2) flooding from spring snow melting, thunderstorms or rainstorms which often wash out fence creek crossings, allowing animals to move from pasture to pasture or completely escape; (3) the loosening of large boulders by freezing and thawing which have rolled down a hillside and torn a hole in the fences; (4) bull elk fighting with free-ranging elk on the outside and tearing up a section of fence; (5) predators such as coyotes digging under fences and leaving holes large enough for deer and antelope fawns and bighorn sheep lambs to escape; (6) elk, bighorn sheep and white-tailed deer jumping over the fence; (7) large trees falling on the fence and opening up an

escape route; and (8) vehicles wrecking and tearing up fences along the state highway allowing animals to escape. SER 120-21.

b. *Disease.*

It was undisputed that game farm animals are capable of transmitting numerous diseases such as tuberculosis, brucellosis, malignant catarrhal fever, and others. ER 55, ER 182-83, ER 212. TB organisms can be passed directly from an infected individual to an individual in close proximity and both captive and free ranging cervids and other prohibited species can be infected with and transmit bovine tuberculosis and brucellosis. ER 211, ER 55, ER 182-83.

A number of states have or had captive cervid herds with TB which can be passed to wild animals. Colorado suffered a TB outbreak in a captive elk herd. The prevalence of TB in that herd was 69% in animals over two years old. ER 450.

TB tests for cervids are unproven, unreliable and/or unavailable. At the very best, they are only 80 to 85% effective. ER 236, ER 148-150. In other words, if there were 100 infected deer, the cervical test for the deer would miss 15 to 20 of those infected deer. SER 316-17.

Moreover, the consequences of a TB outbreak in cattle is substantially different than the consequences of a TB outbreak in captive cervids. Cows or other domestic livestock will not join-up with wild herds of deer or elk. Once TB infects wild herds, it will be virtually impossible to control. ER 213, 215.

c. *Parasites.*

The meningeal worm (brain worm) is a parasite which invades the brain and central nervous system of infected animals, and is illustrative of the risks associated with parasite introduction. SER 72-73. The primary host for this parasite is the white-tail deer. For some reason, the parasite stays on the surface of the brain and/or spinal cord of the white-tail deer and consequently causes essentially no damage to the white-tail deer. SER 72. The white-tail deer, as host, however, allows the

parasite to generate larvae which are capable of being transmitted to virtually any herbivore or ungulate via an intermediate host (slugs or snails). SER 72.

When the parasite is transmitted to other animals, such as caribou, moose, elk, mule deer or black-tail deer, the parasite no longer sits on the surface of the brain or the spinal cord. The parasite burrows into the brain or spinal cord causing significant neurological damage and eventual death. SER 72-73.

To date, the meningeal worm has not been documented in the Northwest. It is, however, prevalent in white-tail deer on the eastern side of the Great Plains where white-tail deer are essentially the only viable cervid species. ER 305. It is not known why this parasite has been geographically limited to the eastern side of the Great Plains region. SER 74. It is suspected that as you approach the more arid plains region, the prevalence of the intermediate hosts (re: slugs, and snails) decreases. SER 74.

There are substantial risks of circumventing the unknown limiting factors for meningeal worm if animals are artificially moved from east to west. SER 74. Dr. Pybus concluded that there is little reason to doubt that the parasite, once transported to northwestern North America, could very easily thrive in this region. SER 74. The consequences of infecting wild animals in North America with this parasite would be devastating.

d. *Hybridization.*

The Court was presented with substantial evidence that many captive exotic cervids and/or their intentionally crossbred offspring are capable of hybridizing with native wildlife and thus destroying the genetic integrity of Washington's native wildlife.

Washington is one of only a handful of states to have all four (4) genera of the cervidae family of North American elk. The consequences of altering the genetics of Washington's resident wildlife are irreversible. SER 131-69.

e. *Habitat Competition/Displacement.*

Again, here, as with disease and hybridization, the Court was presented with substantial evidence regarding the potential for habitat competition and dislocation of resident wildlife by exotic species. History is replete with examples of both intentional and inadvertent introductions of exotic plant and animal species with unanticipated and undesirable results. In the case of many exotic animal species, the potential for habitat competition/degradation is accentuated by attributes such as a high reproductive potential (large litter size or early breeding age), aggressive social behavior, flexible dietary requirements, absence of effective predators, and resistance to disease. The testimony of Dr. Zahn explained that feral populations of game farm animals have caused significant damage to wildlife habitat in a number of other states. SER 224-26.

In summary, the district and Ninth Circuit courts had substantial evidence upon which to assess the character of the subject regulations and upon which to gauge the availability of less burdensome alternatives.

II. REASONS FOR DENYING THE PETITION

The district court and court of appeals fully reviewed the record and cross motions for summary judgment, found no genuine issues of material fact, and held that Washington's regulations did not violate the Commerce Clause of the United States Constitution. There are no valid reasons for Certiorari of this case.

This case involves no conflict or confusion regarding the test to be applied in analyzing the validity of the subject regulations. Application of the usual test to the facts here involved is not worthy of Certiorari. Certiorari would merely require this Court to determine, for the third time, whether there were genuine issues of material fact preventing summary judgment.

This case does not present the issues framed by PNVP. Although these issues, as stated, may be intriguing, they lack any foundation in the record. Moreover, the text of the petition seems simply to request that the Supreme Court reevaluate the evidence presented on summary judgment.

There are only two issues presented by this case. The first is whether the court below was correct in determining that the regulations were not discriminatory. The second is whether the court's assessment of the evidence was correct in determining that the petitioners failed in their burden of proving the availability of less burdensome alternatives that would achieve the state's interests as well as the challenged regulations.

The court below employed the correct tests and properly evaluated the evidence in the context of cross motions for summary judgment.

A. The Opinion Below Correctly Employs The Tests For Determining If State Regulations Discriminate Against Out-Of-State Commerce And If The Burden Imposed By Such Regulations Is Clearly Excessive.

The opinion below accurately applies this Court's well established rules for analyzing state regulations under the Commerce Clause. The opinion begins by correctly explaining the difference in analysis between state laws that discriminate by treating commerce differently based on origin of out-of-state and state laws that deal with commerce evenhandedly, but incidentally burden commerce.

> [S]tate regulations may violate the Commerce Clause either because the regulations discriminate against interstate or foreign commerce, or because they incidentally affect such commerce. If the regulations discriminate in favor in-state interests, the state has the burden of establishing that a legitimate state interest unrelated to economic protectionism is served by the regulations that could not be served as well by less discriminatory alternatives. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986). In contrast, if the regulations apply even-handedly to in-state and out-of-state interests [but incidentally burden commerce], the party challenging the regulations must establish that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the punitive local

> benefits. *See Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 525-26 (1989); *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 471 (1981).

20 F.3d at 1012 (Appendix 8-9 to Petition for Writ of Certiorari). The Ninth Circuit stated the test correctly. If the regulations discriminate between in-state and out-of-state commerce, then the burden is on the state to show that the state's interest could not be served as well by less discriminatory alternatives. In contrast, if the regulations do not discriminate but yet incidentally burden commerce, those challenging the regulations must show that the incidental burdens are clearly excessive in relation to the state's interest.

The Petitioners argue that the opinion simply ignored the applicable standards for review of regulations that "overtly discriminate against interstate commerce." Petition at 10. The lower court expressly held, however, that the regulations are evenhanded and do not discriminate against interstate commerce. 20 F.3d at 1013 (Appendix 11 to Petition for Writ of Certiorari.) ("we apply the test for even-handed regulations with incidental burdens on interstate and foreign commerce.")

PNVP failed in its burden of showing that the regulations were discriminatory. *Hughes v. Oklahoma*, 411 U.S. 322, 336 (1970). The Ninth Circuit analyzed but rejected both of PNVP's two theories that the regulations were discriminatory ("the ban on importation" and "the grandfather clause"). PNVP's reliance on the word "import" was soundly rejected by the lower court:

> In practical effect, the importation ban adds nothing to the prohibitions that apply equally to in-state and out-of-state interests, because animals could not be imported if they are not allowed to be held, possessed, transferred, or sold once inside the state. An import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items. See Chemical

> Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2016-17 (1992) (discussing quarantine laws).

20 F.3d at 1012. In other words, with or without the word "import" in the list of actions prohibited, the effect on commerce is the same and is evenhanded. Regardless of origin in-state or out-of-state, commerce in a regulated species is not allowed in Washington.

It is in this context that PNVP alleges there is a conflict between the Ninth and Tenth Circuits.

The alleged conflict among circuits concerns the opinion of the Tenth Circuit in *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992). In large part, however, the Tenth Circuit is in accord with the opinion below. Like the Ninth Circuit, the Tenth Circuit determined that Wyo. Stat. § 23-1-103, barring all private ownership of big game animals, treated commerce evenhandedly. 957 F.2d at 763. The Tenth Circuit found, however, that Wyo. Stat. § 23-3-301, barring importation into Wyoming of any living big game animal, constituted discriminatory treatment of interstate commerce. 957 F.2d at 765.

The Ninth Circuit disagreed that the word "import," in the context of the subject regulations, rendered them per se discriminatory regardless of the overall regulatory scheme. 20 F.3d at 1012 (Appendix 10 to Petition for Writ of Certiorari). The Ninth Circuit held that the word "import" added nothing to the prohibitions that applied equally to the in-state interests. The Ninth Circuit found that "an import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items (citation omitted)." 20 F.3d at 1012 (Appendix 10 to Petition for Writ of Certiorari).

The alleged "conflict between circuits," is in reality two different courts labelling two different state enactments as discriminatory or even-handed based on their respective interpretations of the language. Whether a particular state regulation discriminates against out-of-state commerce will be unique to the regulation in question.

There is no conflict regarding the circuit courts' substantive analysis of discriminatory or evenhanded state laws affecting commerce. Certiorari is not warranted to address the unique, language-specific issues of whether Washington or Wyoming laws are discriminatory or evenhanded.

PNVP also argues that Washington's regulations cut off all commerce at the border and are therefore discriminatory. Petition at 19, citing *Maine v. Taylor* and *Hughes v. Oklahoma*. Under Washington law, however, a person cannot purchase and possess an elk or sika deer regardless of whether the animal is acquired within or outside the state. There is no different treatment based on origin of items of commerce. The laws at issue in *Maine* and *Hughes* are not analogous to the Washington regulations.

PNVP's argument that the court below erred by not employing the standard of review for *discriminatory* state laws has no merit since the regulations do not discriminate. Even if the Washington regulations did discriminate against out-of-state commerce, however, Certiorari would still be unwarranted. Eight years ago this Court decided *Maine v. Taylor,* and explained how to analyze state laws that discriminate against out-of-state commerce to protect native wildlife. Nothing in the opinion below contradicts or diverges from the Court's analysis in *Maine v. Taylor*. Lower courts have shown no difficulties with the *Maine v. Taylor* analysis. Nothing would be served by repeating that analysis.

B. The Court of Appeals Applied The Proper Standard of Review For Evenhanded State Regulations That Have Incidental Effects On Interstate Commerce.

After rejecting PNVP's arguments that the regulations are discriminatory, the only remaining Commerce Clause issue is whether the lower court correctly applied the test for analyzing evenhanded regulations and whether it applied the correct standards for summary judgment. Neither of these issues merit Certiorari.

The court below properly followed this Court's analysis for balancing putative local benefits against the burdens on

commerce. Quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the court stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . Once a legitimate local purpose is found, the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

20 F.3d at 1014. The opinion below correctly applied the *Pike* analysis on summary judgment, as shown by a review of the elements of that balancing test.

1. ***There Are No Genuine Issues of Material Fact Regarding the Putative Local Benefits of the Regulations.***

The Petitioners assert that the state's regulations are based merely on a "concern for its native wildlife." There was no genuine issue of material fact whether the regulations served important state interests, such as protecting native wildlife from diseases and parasites carried by the regulated species, maintaining genetic purity of native wildlife, avoiding habitat competition from exotic escaped animals, preventing poaching of native wildlife for additions to captive herds. 20 F.3d at 622. Prior cases of this Court demonstrate that these are substantial and important local interests. *See Maine v. Taylor*, *supra*; *Hughes v. Oklahoma*, 441 U.S. 332, 337 (1979).

Given that there was no genuine issue of fact regarding the putative local interests served by Washington's regulations,

PNVP had to show that the incidental burden on interstate commerce was "clearly excessive" when compared to local interest served by the regulations. PNVP could have done so by proving that there were less burdensome alternatives that served Washington's interest in protecting native wildlife "as well" as the challenged regulations. PNVP failed to produce evidence to create a genuine issue of fact regarding the availability of less burdensome alternatives that would serve the state's interests as well.

2. *There Are No Genuine Issues of Material Fact Regarding the Absence of Less Burdensome Alternatives.*

The Petition fails to offer any coherent argument on alternatives to the regulations. First, the Petition incorrectly states that Washington had the burden to show that the alternatives were "infeasible." Petition at 23. *Pike* and subsequent cases demonstrate that for even-handed state regulations, the challenger faces a heavy burden of proving unconstitutionality.

PNVP also mischaracterizes the issue regarding the existence of less burdensome alternatives. A "less burdensome alternative" tends to show that state regulation is "clearly excessive" only if that alternative serves the putative local interests *as well* as the challenged regulations. E.g. *Pike*, 397 U.S. at 142 ("whether it could be promoted *'as well'* with a lesser impact on interstate activities.") In this case, PNVP's own evidence substantiated the risks which these regulations address. Moreover, PNVP, offered evidence about alternatives that, according to PNVP's own evidence, would *not* protect Washington wildlife as well as the adopted regulations. In each of the categories of risk, the undisputed and/or undisputable evidence supports the validity of the subject regulations.

a. *Escape.*

Petitioner Anita Rich admitted, that despite a seven foot tall, high tensile steel fence, with knots at every joint, fence

anchors, barbed wire and shade cloth, a sika deer escaped the enclosure by some unknown means. ER 364. Dr. Davis, petitioners' expert, acknowledged that game farmed animals "will get out, just like cattle." ER 216. Even Dr. Templeton, another of petitioners' experts, admitted the "possibility that some or all cervids could escape because of some natural disaster that destroyed the fences and neutralized the attempts at recapture." ER 432.

PNVP could not contradict other evidence of escape. In addition to the testimony of the petitioners' experts, Dr. Mike Miller, a veterinarian for Colorado Department of Wildlife, indicated that, despite stringent fencing requirements, there have been numerous documented escapes from game farms and game ranches within Colorado. SER 280-81. (Declaration of Miller, pp. 3-4.) Huey Dawson, the manager of the Sybille Wildlife Research Facility, also chronicled known escapes of hoofed big game species from the Sybille Wildlife Research Unit owned and administered by the Wyoming Game and Fish Department. SER 219-21. As discussed in the Statement of the Case, these escapes have resulted from any number of natural occurrences and the actions or inactions of man. SER 120-21.

b. ***Disease.***

With respect to disease, PNVP's own evidence regarding tuberculosis demonstrated the validity of the regulations.

There was no dispute that both captive and free ranging cervids and the other prohibited species can be infected with and transmit bovine tuberculosis and brucellosis. Dr. Mead confirmed that at least 12 captive cervid herds had TB and that wild animals can get and carry brucellosis. ER 55, 182-83. Dr. Davis from Texas confirmed that TB organisms can be passed directly from an infected individual to an individual in close proximity. ER 211.

The Declaration of Jim Williams, the Colorado State veterinarian, confirmed that Colorado suffered a major TB outbreak in a captive elk herd. ER 450. The prevalence of TB in that herd was 69% in animals over two years old. ER 450.

PNVP argued that TB tests on cervids were an alternative. PNVP's own experts, however, admitted that "the current TB tests (cervical for deer) are only 80 to 85% effective." ER 236 (Dr. Dix); ER 148-150 (Deposition of Dr. Mead). In other words, if there were 100 infected deer, the cervical test for the deer would miss 15 to 20 of those infected deer. SER 316-17 (Deposition of Dr. Mead). Dr. Mead also acknowledged that he is not one-hundred percent confident that if the best TB test for a cervid herd was negative then the animals are TB free. ER 158. Dr. Mead also admitted that one-third of bovine herds cleared by TB testing came back within five years as infected. SER 317. PNVP simply opines that even if TB testing is only 80% effective, it is acceptable. E.g. ER 162.

PNVP's evidence, therefore, does not contradict the very real potential for tuberculosis and brucellosis transmission to native wildlife from the regulated species. The consequences of a TB outbreak in cattle is substantially different than the consequences of a TB outbreak in captive cervids. Cows or other domestic livestock will not join-up with wild herds of deer or elk. Once TB infects wild herds, it will be virtually impossible to control. ER 213, 215.

The risk of TB and brucellosis in captive wildlife species is substantial. The risk of transmission to native wildlife is also substantial. The consequences of infecting native wildlife with TB or brucellosis would be catastrophic.

c. *Parasites.*

As with diseases, there are a multitude of parasites which may infect both captive and wild ranging cervids and other wildlife. Again, a discussion of the evidence concerning one such parasite is sufficient to validate the Department's regulations.

As was discussed in the Statement of the Facts, the meningeal worm (brain worm) is a parasite which invades the brain and central nervous system of infected animals. SER 72-73 (Dr. Pybus). The white-tail deer, as host for this parasite, suffers no damage. The white-tail deer, however,

allows the parasite to generate larvae which leave the white-tail deer on the fecal pellets. SER 72.

When the parasite is transmitted to other animals, such as caribou, moose, elk, mule deer or blacktail deer the parasite no longer sits on the surface of the brain or the spinal cord. The parasite burrows into the brain or spinal cord causing significant neurological damage and eventual death. SER 72-73.

PNVP relies on Dr. Foreyt who opines that white-tailed deer are the only "important" reservoir of the parasite meningeal worm. Dr. Foreyt had to acknowledge, however, that in an experiment (conducted by Dr. Pybus and other associates generally considered to be the foremost experts in this area) and "in a few naturally documented cases" infected elk have been shown to occasionally pass low numbers of larvae, and therefore should be considered as a potential host (of this parasite). ER 305-7.

As discussed in detail in the Declaration of Dr. Pybus, SER 70-79, the experiment which she and her colleagues conducted conclusively established that not only white-tailed deer but elk were capable of becoming infected with and transmitting the larvae of the meningeal worm. SER 77. She further found that elk shed this larvae intermittently at low densities making it very difficult to test for in fecal samples. SER 77.

Again, as with the discussion of tuberculosis, petitioners' own expert acknowledges that there is a risk, although he describes it as "very low," of meningeal worm becoming a disease problem in wildlife in Washington. ER 306. Dr. Foreyt opines that the "game ranching factor" can eliminate the risk posed by meningeal worm by prohibiting the movement of white-tailed deer and elk from indigenous areas of North America. Dr. Foreyt merely proposed the same course of action attempted in Alberta. After a relatively short period of time Alberta discovered that documents were being forged and animals, which in fact had been in northeastern North America, were being imported into Alberta under fraudulent documentation. SER 75. As a consequence, Alberta closed its borders.

d. ***Hybridization.***

PNVP had little evidence about risks of hybridization, PNVP relies on Dr. Joe Templeton to address risks of harmful hybridization. (Respondents' evidence on this subject was essentially unopposed. See Dr. Peter Dratch, SER 131-69; SER 201-8.) Within his area of competence, however, Dr. Templeton acknowledged that elk hybridization was possible from farmed elk or elk hybrids. PNVP's evidence from Dr. Dix also admitted the risks from captive elk. ER 250. None of PNVP's experts could dispute Dr. Dratch's testimony that 10% of captive elk were in fact hybrids.

There was no genuine issue of fact about the potential hybridization from prohibited species or the harm such crossbreeding will cause to native wildlife. See SER 131-69 (Dr. Dratch); SER 182 (Gary Burke).

e. ***Habitat Competition.***

Again, here, as with disease and hybridization, petitioners' own experts admit some potential for habitat competition and potential dislocation. The defendants' expert witnesses believe that this potential is far greater than that suggested by Dr. Dix. The evidence concerning habitat competition and displacement is summarized in the Statement of the Case, p. 14-15 *infra*. (See Declaration of Max Zahn, SER 224-26.) However, for purposes of summary judgment, the admissions of Dr. Dix alone are sufficient to validate the Department's concerns.

Dr. Dix (a game farmer and one of PNVP's experts) acknowledges that "it is conceivable that some of the deer on the proposed deleterious species list may compete with white-tails (sika having been so implicated), fallow deer clearly do not and no adequate data exists on the other species." ER 245. According to Dr. Dix, some studies (Hayes and Shotts 1959) suggest nutritional and/or disease resistance advantages of sika deer leading to a competitive advantage over white-tails.

For purposes of reviewing summary judgment, the petitioners and their experts admitted facts sufficient to validate the Department's regulations. The opinion below accurately held that there was no genuine issue regarding the propriety of the

state's interest and the absence of evidence of less burdensome alternatives that would serve the state's interests as well as the regulations. 20 F.3d at 1017. (Appendix 20-21 to Petition for Writ of Certiorari) PNVP offered only evidence about alternatives that it felt would be preferable. PNVP thus ignored the material issue – whether alternatives would work "as well." The lower court explained how PNVP's evidence missed the mark by admitting that PNVP's alternatives increased the risks to Washington's native wildlife, arguing only that the increased risks were acceptable to PNVP's affiant. 20 F.3d at 1016. (Appendix 19 to Petition for Writ of Certiorari)

PNVP now argues that any dispute among experts creates a genuine issue for trial. The summary judgment inquiry, however, focuses on "material" facts. Fed. R. Civ. P. 56(c). A material fact is one that will affect the outcome under the governing law. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248 (1986). PNVP's evidence provided no genuine issue that its preferred alternatives would work as well as the regulations and creates no genuine issue of material fact.

PNVP's assertions that the Ninth Circuit resolved disputes among experts against PNVP is also based on PNVP's misunderstanding of the material facts under the Commerce Clause. Since PNVP's experts merely argued that the state should accept greater risks to native wildlife, the evidence did not create a genuine issue regarding whether PNVP's alternatives worked as well. 20 F.3d at 1016 ("We doubt that these expert opinions as to the efficacy of PNVP's proposed alternatives could support a factual finding in PNVP's favor.") The third "Issue Presented" in the Petition, therefore, has no sound basis in the opinion or record.

The Ninth Circuit correctly noted that the power to weigh risks, advantages, and alternatives is vested with the legislative or quasi-legislative bodies adopting rules or statutes. 20 F. 3d 1016. The role of the courts is to determine whether the weighing of alternatives by legislating bodies results in "clearly excessive" burdens on interstate commerce. PNVP's arguments that a jury should be allowed the opportunity to weigh the advantages of alternatives is, therefore, without merit.

3. *There Are No Genuine Issue of Material Fact Regarding the Burdens on Interstate and Foreign Commerce.*

PNVP's Petition mischaracterizes the holding of the court of appeals regarding the incidental burdens on interstate commerce. In various places, PNVP asserts that the Ninth Circuit read the burden element out of the *Pike* balancing test, Petition at 18, that it contradicted *Clover Leaf Creamery Co.* by not analyzing the burden on interstate commerce, *ibid* at 21, or that it concluded that the burden on commerce was irrelevant, *ibid*. None of PNVP's arguments accurately reflect the lower court's opinion.

The Ninth Circuit expressly adopted the *Pike* test regarding incidental burdens. 20 F. 3d at 1014. The court then explained:

> To defeat the Department's motion for summary judgment, PNVP was required to show that it could offer evidence at trial legally sufficient to support a determination that the impacts of the regulations on interstate and foreign commerce are so great that they outweigh this vital state interest [in the preservation of its wildlife]. Evidence that interstate and foreign commerce is in some way affected by the regulations is not enough to meet his burden; what is required is evidence that these effects are of a type or an extent that could support a determination that they are "clearly excessive" in relation to the state's interest in the health of its native wildlife. [citations omitted]. PNVP has failed [sic] show that it could produce such evidence.

20 F.3d at 1014-15. This passage demonstrates how PNVP misstates the opinion below. The court of appeals did not ignore the burdens on interstate commerce or read that element out of the *Pike* balancing test. It expressly reviewed the record on summary judgment and found no evidence to justify further fact

finding about whether burdens on interstate commerce were "clearly excessive" in relation to the interest in protecting native wildlife from disease, parasites, hybridization, or competition.

III. CONCLUSION

Certiorari is not warranted to review the evidentiary record on summary judgment for a third time. The court of appeals properly evaluated the evidence in the context of cross motions for summary judgment. From that evaluation, the court correctly concluded that the regulations at issue were not discriminatory and that petitioners had failed to show that the incidental burden on commerce was clearly excessive when compared to the state's interests in protecting its wildlife from the risks inherent in game farming and game ranching.

Certiorari should be denied.

CHRISTINE O. GREGOIRE
Attorney General

ROBERT K. COSTELLO
Sr. Assistant Attorney General
Counsel of Record
JAY D. GECK
Assistant Attorney General
Attorneys for Respondents

(4)

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No. 94-20

In The

Supreme Court of the United States

October Term, 1994

PACIFIC NORTHWEST VENISON PRODUCERS, a Washington corporation; ROBERT V. BAKER; JAMES E. RICH; D. BRUCE MORGAN; and WASHINGTON ALTERNATIVE LIVESTOCK ASSOCIATION, a Washington corporation,

Petitioners,

v.

CURT SMITCH, Director of Washington Department of Wildlife; DEAN A. LYDIG, JAMES M. WALTON, MITCH JOHNSON, TERRY KARRO, JOHN McGLENN, NORMAN F. RICHARDSON, Commissioners of the Washington State Wildlife Commission; and the WASHINGTON STATE DEPARTMENT OF WILDLIFE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL M. SEBY
WILLIAM PERRY PENDLEY*
*Counsel of Record
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
(303) 861-0244

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. RESPONDENTS' INTERPRETATION OF THE COMMERCE CLAUSE IS CONTRARY TO SUPREME COURT PRECEDENT 2

II. WASHINGTON'S REGULATIONS EXCESSIVELY BURDEN INTERSTATE COMMERCE BY IGNORING THE AVAILABILITY OF LESS DISCRIMINATORY ALTERNATIVES 6

III. RESPONDENTS IGNORE THE SPLIT BETWEEN TWO CIRCUIT COURTS ON AN ISSUE OF TREMENDOUS CONSTITUTIONAL IMPORTANCE 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 8

Dorrance v. McCarthy, 957 F.2d 761 (10th Cir. 1992) 9

Hughes v. Oklahoma, 411 U.S. 322 (1970) 4, 6

Industrial Union v. American Petroleum, 488 U.S. 681 (1980) 10

Maine v. Taylor, 477 U.S. 131 (1986) 4, 6, 7, 8

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 4, 5, 6, 7

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).....4, 9

OTHER AUTHORITY

Federal Rule of Civil Procedure 56..... 8

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INTRODUCTION

A common thread which runs through Respondent's Brief in Opposition is that the emergency regulations adopted by the State of Washington were the product of a magnificent effort to save Washington wildlife from selfish individualism. Even if this sort of revisionist history were accurate, which it is not, it does little to assuage the

constitutional difficulties created by the emergency regulations. The issues presented by this case do not threaten future generations and their ability to enjoy and make use of Washington state's magnificent wildlife; rather, this case is about preserving the rights of all generations – present and future – when they are threatened by expedient rather than reasoned approaches to worthy goals.

The Petition before the Court is not, as Respondents mischaracterize, an invitation to determine whether there were genuine issues of material fact preventing summary judgment. Opp. to Pet. at 9. Rather, *certiorari* is warranted to correct the Ninth Circuit's significant deviation from this Court's Commerce Clause decisions, and to resolve a direct and irreconcilable conflict between two federal circuit courts.

The Ninth Circuit's opinion erroneously creates a Commerce Clause standard which would make irrelevant the question of the degree of the burden imposed by Washington's regulations on interstate commerce. The Ninth Circuit's opinion is directly contrary to, and would vitiate, the Commerce Clause test expressly mandated by this Court.

I. RESPONDENTS' INTERPRETATION OF THE COMMERCE CLAUSE IS CONTRARY TO SUPREME COURT PRECEDENT

The legal standard governing Petitioners' Commerce Clause challenge to Washington's regulations, which ban the importation and ownership of certain animals, can be summarized succinctly. A court must determine whether the regulations discriminate against interstate commerce, either on their face or in practical effect, or whether the regulations regulate evenhandedly, putting only an "incidental burden" on interstate commerce. Pet. at 11. If the regulations regulate evenhandedly, they will be struck down only if the incidental burdens they impose are clearly excessive in relation to the putative local benefits. *Id.* If the regulations are discriminatory, the burden to

show constitutionality shifts to the state, which must show that the regulations advance a legitimate state interest which could not be served as well by available non-discriminatory means.

Nonetheless, Respondents argue that where a regulation regulates evenhandedly, the "incidental burden" (the extent of which the court must assess in comparison to the putative local benefits) refers not to a burden at all, but is rather a question of whether or not the statute "discriminates" against commerce "indirectly." Opp. to Pet. at 11. From this Respondents argue that once a court finds there is not "direct discrimination," but merely an "incidental burden," the extent or amount of the burden is irrelevant, Opp. to Pet. at 12, and thus, the court need not consider whether there are less burdensome alternatives to protect the putative local interest. *Id.* This analysis is not only sophistry, but is directly contradicted by Supreme Court precedent.

Stripped to its essence, what Respondents are trying to do is construct a circular argument in order to read "burden" out of the test, and confine the test solely to the question of discrimination. They concede that a non-discriminatory regulation is unconstitutional if it is excessively burdensome, but then evade the factual issue of whether it is excessively burdensome by arguing the regulation cannot be burdensome if it is non-discriminatory. It is a formulation which would make the commerce clause inapplicable to any regulation that burdened interstate commerce, but is non-discriminatory, and also makes irrelevant any consideration of the extent of the burden in relation to the putative local purpose where the burden was simply incidental.

Respondents' argument ignores this Court's leading Commerce Clause decisions. Petitioners never conceded that Washington's regulations are, in fact non-discriminatory, given the fact that these regulations cut off all

commerce at the state's border.[1] Such laws have been held by this Court to be the hallmark of a discriminatory enactment.[2] However, even if Washington's regulations were non-discriminatory, this Court's Commerce Clause decisions require that any burdens imposed on commerce are still subject to the constitutional requirement that such burdens not be excessive. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Not only is Respondents' formulation directly contrary to this Court's precedents (which expressly holds that non-discriminatory statutes can be an unlawful burden on interstate commerce even if the burdens they impose are "even-handed"), but the Court has expressly directed that an analysis, as to the extent of the burden and the availability of other alternatives, must be performed even where there is no discrimination. Specifically, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), a case which both Respondents and the Ninth Circuit suggest controls this case, Opp. to Pet. at 11, this Court first discussed the standard to be applied to statutes which discriminate against interstate commerce, either in purpose or in practical effect. The Court then held:

> Even if a statute regulates "evenhandedly," and imposes only "incidental" burdens on interstate commerce, the courts must *nevertheless* strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174

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[1] Respondents explicitly acknowledged this fact in the District Court. Pet. at 19. Respondents continue to ignore the significant evidence which taints the alleged putative purpose for the regulations. Such unfair and biased decisionmaking should not be permitted to be cloaked as a "legitimate state interest." Pet. at pp. 15-16.

[2] *See Maine v. Taylor*, 477 U.S. 131, 137 (1986); *Hughes v. Oklahoma*, 411 U.S. 322 (1970). Pet. at 10.

> (1970). Moreover, the *extent of the burden* that will be tolerated will of course depend on the nature of the interest involved, and *on whether it could be promoted as well with a lesser impact on interstate activities.*

449 U.S. at 471 (emphasis added).

In *Clover Leaf*, this Court had before it a Minnesota statute which banned the sale of milk packaged in plastic containers, but which permitted milk to be sold in cartons and bottles. The Court determined that the statute did not discriminate as between interstate and intrastate commerce, but was "even-handed." 449 U.S. 472. According to the Ninth Circuit's formulation of the commerce clause test, the *Clover Leaf* court should have ended the inquiry at this point, but it did not. Instead, the Court went on to analyze, based on a record developed by a trial on the merits, whether or not the burden placed on interstate commerce was "clearly excessive."

This Court first considered, in its review of the facts, whether, and to what extent, the Minnesota statute stopped the interstate movement of milk to customers in Minnesota. After reviewing the record, the Court concluded that the statute did not stop the movement of milk into the state but merely made it "slightly" more inconvenient to sell milk because interstate sellers would have to conform to different packaging requirements. *Id.* at 472. This Court also noted that the statute did not preclude the manufacture or sale of plastic containers in or from Minnesota, because the principal dairy in Minnesota admitted it would continue to sell milk in plastic non-returnable containers to customers in other states. *Id.* at 472, n.16. This Court also considered the question of whether there were any less burdensome means to achieve the environmental objectives demonstrated, as a matter of fact, to underlie the Minnesota statute and concluded there were none. *Id.* at 473-474. *Clover Leaf* is the law of the land. It has not been overruled and the approach it dictates, which requires a weighing and a balancing of local interests and burdens on commerce

even where the burdens imposed by legislation are non-discriminatory, continues to be the approach taken by this Court. The statute at issue in *Clover Leaf* banned imports of milk in plastic containers, but it did not bar milk imports *per se*. The Ninth Circuit upheld the Washington regulatory ban which prohibits importation of certain species no matter how they may be packaged. The Ninth Circuit's opinion significantly deviates from this Court's decisions and *certiorari* is warranted to correct the Ninth Circuit's divergence.

II. WASHINGTON'S REGULATIONS EXCESSIVELY BURDEN INTERSTATE COMMERCE BY IGNORING THE AVAILABILITY OF LESS DISCRIMINATORY ALTERNATIVES

The question of whether Washington's regulations are "clearly excessive in relation to the putative local benefits" is "one of degree" requiring a balancing approach, as Respondents themselves concede. Opp. to Pet. at 14. However, contrary to Respondents' assertions, this requires an evidentiary consideration of the factual contentions of the parties. This is precisely the approach this Court has followed in the leading commerce clause cases; typically deciding them on a full record with deference to findings below by triers of fact. Thus, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), *Maine v. Taylor*, 477 U.S. 131 (1985), and *Hughes v. Oklahoma*, 441 U.S. 332 (1979), this Court in each case did its weighing and balancing *only after* the lower court had heard all the evidence and held a trial on the merits. Despite the Ninth Circuit's inappropriate expert credibility determinations, this same procedure should have been followed here. Pet. at 27.

First and foremost, a factual determination should have been made as to the extent of the burden on commerce. Although the Ninth Circuit concluded this burden was apparently irrelevant, it did so in the face of a

substantial record of evidence to the contrary.[3] At a minimum, the Ninth Circuit failed to recognize there were substantial issues of fact regarding the extent of that burden. Pet. at 17.

In order to determine whether or not the burden was excessive in relation to the putative local benefits, the Ninth Circuit also should have determined whether Washington's regulations serve those benefits in a manner which does not put an excessive burden on commerce. As part of its analysis, the Ninth Circuit under the rule of *Clover Leaf*, would have had to consider, and accept as true, Petitioners' evidence demonstrating the availability of less burdensome means to serve the regulations' alleged goals.

Respondents assert that there is a disagreement among experts as to the availability of satisfactory alternatives and that this was enough to defeat the showing required of a plaintiff, citing *Maine v. Taylor*, 477 U.S. 131 (1986). Opp. to Pet. at 14. The Ninth Circuit's reliance on *dicta* in *Maine v. Taylor, supra*, led it to ignore the importance of this Court's other Commerce Clause precedents and Petitioners' evidence that available alternatives to an outright prohibition exist to satisfy the Respondents' alleged concerns. Appendix 21 to Petition for Writ of *Certiorari*.

Furthermore, Respondents argue for an interpretation of *Maine* which significantly departs from this Court's carefully developed precedent. Respondents' assertion is inappropriate on a motion for summary judgment and factually wrong in this case. First, Petitioners

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[3] The Respondents, while conceding that there are issues of fact on the availability of acceptable alternatives, seek to attack Petitioners' experts in a series of mischaracterizations. Opp. to Pet. at 6. However, all of their assertions, in addition to mischaracterizing Petitioners' expert testimony and its conclusion that there are acceptable alternatives, go to the weight and credibility to be accorded Petitioners' expert witness testimony. Such attacks are irrelevant on a motion for summary judgment.

presented an overwhelming amount of *uncontroverted* evidence regarding available alternatives. Second, this Court's ruling in the *Maine* case was made only *after* development of a full-evidentiary record and hearings in which experts were subject to cross-examination. *See* 477 U.S. at 140; *cf., id.* at 143, n.15. No such hearings have been conducted here due to the premature dismissal of this case on the pleadings. Third, although in *Maine* the statute's challenger conceded there were no scientific tests for disease, here Petitioners' experts testified that there are scientifically-recognized tests which are in fact being utilized by Washington for imports of other animals. Moreover, these tests are being effectively used in other states. As the Court said in *Maine*, a state "no longer may be able to justify its import ban" once scientifically-acceptable sampling and inspection procedures are available. 477 U.S. at 147.

The Ninth Circuit disposed of Petitioners' case on the pleadings by making credibility determinations that were not within its power on a motion for summary judgment. Pet. at 27. This Court has never approved summary judgments that rest on credibility determinations.

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The Ninth Circuit's brazen departure from this Court's teachings and Fed. R. Civ. P. 56, amounts to an assertion that the courts are obligated to accept any proffered justification of a statute at face value, no matter how tenuous its logic or dubious its assumptions. The Ninth Circuit's opinion significantly deviates from this Court's decisions and *certiorari* is warranted to correct the Ninth Circuit's divergence.

III. RESPONDENTS IGNORE THE SPLIT BETWEEN TWO CIRCUIT COURTS ON AN ISSUE OF TREMENDOUS CONSTITUTIONAL IMPORTANCE

Respondents' attempt to distinguish *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992), is nonsensical. Opp. to Pet. at 12. Respondents ignore a clear split in Commerce Clause interpretation which even the Ninth Circuit recognized. Appendix 10 to Petition for Writ of *Certiorari*. Both the Ninth and Tenth Circuits based their decisions on *Pike v. Bruce Church*, 397 U.S. 137 (1970). The Tenth Circuit held that a District Court in Wyoming failed to consider the availability of the same less burdensome alternatives as those presented in this case. The attempt by Respondents to isolate themselves from deer and elk species which are being sold in interstate commerce is virtually identical to the attempt made by the Wyoming Game and Fish Commission to ban the importation of elk into Wyoming. The Tenth Circuit, in reaching its decision, was compelled to follow twenty years of Supreme Court precedent flowing from the *Pike* analysis. *Dorrance, supra*, at 765 (citation omitted).

However in Petitioners' case, the Ninth Circuit found that unless Petitioners could prove their alternatives could *eliminate* all risk, no balancing would be done and the regulation would be valid. The Ninth Circuit reached this illogical conclusion despite noting that:

> . . . [A]t some point the risks presented by proposed alternatives as compared to challenged regulations would be so small that courts should not give them credence. PNVP has arguably offered evidence that could support a finding that its proposed alternatives would reduce the risks to that point.

Appendix 20 to Petition for Writ of *Certiorari*.

The record in this case does not lend itself to the balancing of interests required in Commerce Clause cases. While the Respondents claim, through affidavits, that there might be a risk to wildlife from deer and elk

farming, Respondents have not produced substantial evidence that the risk is so great that interstate commerce must be halted and an industry closed. As stated in *Industrial Union v. American Petroleum*, 488 U.S. 681 (1980), "Perfect safety is a chimera, regulation must not strangle human activity in the search for the impossible." If Respondents wish to rely on their interest in ecological preservation, they must show that interest, and the infeasibility of other alternatives, with far greater specificity than that which convinced the Ninth Circuit. Mere supposition of environmental harm is not constitutionally permissible. Pet. at 10.

The Ninth Circuit's opinion is in irreconcilable conflict with a decision of the Tenth Circuit and *certiorari* is warranted to resolve this split between the circuits on an issue of constitutional importance.

CONCLUSION

For the foregoing reasons, and those contained in the Petition, a *writ* of *certiorari* should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals, or in the alternative, the decision below be summarily vacated and the case remanded for adequate consideration below.

Respectfully submitted,

PAUL M. SEBY
WILLIAM PERRY PENDLEY*
*Counsel of Record
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
(303) 861-0244

Attorneys for Petitioners